

## Missouri Attorney General's Opinions - 1976

Opinion	Date	Topic	Summary
<a href="#">1-76</a>	Mar 19		Opinion letter to the Honorable Richard M. Webster
<a href="#">3-76</a>	May 19		Opinion letter to Mr. Theodore L. Johnson III
<a href="#">4-76</a>	Dec 23		Opinion letter to the Honorable James Millan
<a href="#">5-76</a>	Jan 26		Opinion letter to the Honorable Jerold L. Drake
<a href="#">6-76</a>	Feb 6	COMPENSATION. REORGANIZATION ACT. MISSOURI HIGHWAY RECIPROCITY COMMISSION.	The Omnibus State Reorganization Act of 1974 authorizes the Director of Revenue to approve all salary increases for employees of the Missouri Highway Reciprocity Commission.
<a href="#">7-76</a>	Jan 19		Opinion letter to Mr. John Brawley
<a href="#">8-76</a>	Apr 5		Opinion letter to Dr. Arthur L. Mallory
<a href="#">10-76</a>	Jan 14		Opinion letter to Mr. William J. Raftery
<a href="#">11-76</a>	Jan 20		Opinion letter to Mr. Alan C. Kohn
<a href="#">12-76</a>	Feb 3		Opinion letter to the Honorable Ronald L. Boggs
<a href="#">14-76</a>	Jan 28		Opinion letter to the Honorable Jim Arnold
<a href="#">15-76</a>	Feb 23		Opinion letter to the Honorable Frank Bild
<a href="#">16-76</a>	Jan 23		Opinion letter to the Honorable Wesley A. Miller
<a href="#">17-76</a>	Aug 20		Opinion letter to Mr. J. Neil Nielsen
<a href="#">19-76</a>	Apr 5	STATE TREASURER.	The State Treasurer is authorized to invest through repurchase agreements in United States obligations payable within one year those moneys not needed for current operating expenses and that are available for less than thirty days. The obligations must be kept by the State Treasurer in the manner provided in Section 30.270(2), V.A.M.S.
<a href="#">21-76</a>	Jan 19	STATE AUDITOR. CONSTITUTIONAL LAW. KANSAS CITY PHILHARMONIC ORCHESTRA.	The State Auditor is not authorized to audit the Kansas City Philharmonic Association.
<a href="#">22-76</a>	Oct 26		Opinion letter to Mr. Michael D. Garrett

<a href="#">25-76</a>	Feb 3		Opinion letter to the Honorable Paul L. Bradshaw
<a href="#">26-76</a>	Feb 3		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">27-76</a>	Feb 11		Opinion letter to the Honorable James F. McHenry
<a href="#">29-76</a>	June 18		Opinion letter to Mr. Lawrence L. Graham
<a href="#">30-76</a>	Feb 11		Opinion letter to the Honorable Robert S. Drake, Jr.
<a href="#">31-76</a>	Feb 4		Opinion letter to the Honorable Christopher S. Bond
32-76			Withdrawn
<a href="#">33-76</a>	Mar 29		Opinion letter to the Honorable Bud Fendler
<a href="#">34-76</a>	Feb 23		Opinion letter to the Honorable Emory Melton
<a href="#">36-76</a>	Feb 27		Opinion letter to The Honorable Bob F. Griffin
<a href="#">37-76</a>	Feb 24		Opinion letter to the Honorable John W. Reid, II
38-76			Withdrawn
<a href="#">39-76</a>	Mar 10	COMPENSATION. REVENUE SHARING. DEPUTY COLLECTORS. COUNTY COLLECTORS.	Federal revenue sharing funds received by McDonald County may not be used to supplement the compensation of deputy county collectors.
<a href="#">40-76</a>	Feb 11		Opinion letter to the Honorable Donald L. Manford
<a href="#">41-76</a>	May 18		Opinion letter to Mr. Michael D. Garrett
<a href="#">42-76</a>	Mar 8		Opinion letter to the Honorable Richard J. DeCoster
<a href="#">45-76</a>	Mar 8		Opinion letter to Mr. Lawrence L. Graham
<a href="#">46-76</a>	Mar 10		Opinion letter to the Honorable Steve Vossmeier
<a href="#">47-76</a>	Mar 16		Opinion letter to the Honorable Steve Vossmeier
<a href="#">48-76</a>	Feb 25	STATE AUDITOR. LAND REUTILIZATION AUTHORITY.	The Land Reutilization Authority of the City of St. Louis (Sections 92.700-92.920, V.A.M.S.) is an office within the "political subdivision" of the City of St. Louis, as the term is used in Section 29.230.2, RSMo, and, therefore, the State Auditor is authorized to include it within his audit of the City of St. Louis.
<a href="#">49-76</a>	May 4		Opinion letter to Mr. Alfred C. Sikes
<a href="#">50-76</a>	June 3	BARBERS. COSMETOLOGISTS.	A licensed barber may arrange, dress, curl, singe, wave, permanent wave, cleanse, cut, bleach, tint, or color hair as a normal incident of dressing hair.



<a href="#">51-76</a>	Feb 23		Opinion letter to the Honorable Ron Bockenkamp
<a href="#">52-76</a>	Apr 14		Opinion letter to Mr. Warren M. Black
<a href="#">53-76</a>	Apr 20	COUNTY COURT. COUNTY CLERK.	A county court has authority to employ secretarial, clerical, and administrative personnel, to establish a data processing department under its control, and to employ personnel to staff that department as may be indispensably necessary for the discharge of the duties of the county court in the management of county business in the absence of a statutory provision vesting the functions to be performed by such personnel in the county clerk or some other county officer.
<a href="#">54-76</a>	Mar 8		Opinion letter to the Honorable Walter L. Meyer
<a href="#">55-76</a>	Mar 16		Opinion letter to the Honorable Michael L. Shortridge
<a href="#">56-76</a>	Mar 19	APPROPRIATIONS.	Section 23, Article IV, Constitution of Missouri, does not require that an appropriation must be stated as a specific dollar amount but only requires that the amount be capable of ascertainment; and, therefore, so-called "open-ended" appropriations, as illustrated by Sections 4.265 and 4.595 of House Bill No. 4, First Regular Session, 78th General Assembly, and Section 6.050 of House Bill No. 6, First Regular Session, 78th General Assembly, are valid. Furthermore, the practice of stating estimated amounts with "open-ended" appropriations, as illustrated by Section 4.265 of House Bill No. 4, First Regular Session, 78th General Assembly, does not constitute maximum limitations which must be adhered to.
<a href="#">57-76</a>	Mar 18	SCHOOLS. TAXATION (SCHOOLS). CONSTITUTIONAL LAW. SPECIAL SCHOOL DISTRICTS.	Article X, Section 11 of the Missouri Constitution does not authorize special school districts to levy taxes at the rates established therein absent legislation conferring upon special school districts that authority. Section 162.920, RSMo Supp. 1973, establishes twenty-five cents per one hundred dollars assessed valuation as the maximum tax levy that special school districts may assess without voter approval. That rate may be increased with voter approval in the manner provided in Chapter 164, RSMo.
<a href="#">58-76</a>	Oct 5	STATE AUDITOR. CONSTITUTIONAL LAW. OFFICE OF ADMINISTRATION.	To the extent that the proposed financial management and control system (SAM) involves the establishing of a system of accounting for public officials of the state of Missouri, the responsibility for designing and requiring the implementation of that accounting system rests solely with the State Auditor pursuant to the provisions of Article IV, Section 13, Missouri Constitution 1945. Those aspects of SAM not fairly included within the term "systems of accounting," as used in Article IV, Section 13, would be the responsibility of the Commissioner of Administration.
<a href="#">59-76</a>	Mar 10		Opinion letter to the Honorable Norman L. Merrell

<a href="#">60-76</a>	Oct 5	STATE AUDITOR. CONSTITUTIONAL LAW. OFFICE OF ADMINISTRATION.	To the extent that the proposed financial management and control system (SAM) involves the establishing of a system of accounting for public officials of the state of Missouri, the responsibility for designing and requiring the implementation of that accounting system rests solely with the State Auditor pursuant to the provisions of Article IV, Section 13, Missouri Constitution 1945. Those aspects of SAM not fairly included within the term "systems of accounting," as used in Article IV, Section 13, would be the responsibility of the Commissioner of Administration.
<a href="#">62-76</a>	May 13	STATE FUNDS. STATE TREASURER.	The State Treasurer has the authority to look beyond the face of revenue transmittals to determine to what fund the monies should be credited. If the Treasurer determines that a state agency has not designated the proper fund, he may request the agency to submit a corrective revenue transmittal.
63-76			Withdrawn
<a href="#">64-76</a>	Mar 17		Opinion letter to the Honorable James N. Foley
<a href="#">65-76</a>	Mar 18		Opinion letter to Mr. James R. Spradling
<a href="#">67-76</a>	Mar 18		Opinion letter to the Honorable Steve Gardner
<a href="#">68-76</a>	Mar 29		Opinion letter to the Honorable Al Nilges
<a href="#">69-76</a>	Apr 15	PERMITS. STATE PROPERTY. AIR CONSERVATION. SOVEREIGN IMMUNITY. DEPARTMENT OF NATURAL RESOURCES.	A city or county which holds a certificate of authority granted by the Missouri Air Conservation Commission pursuant to Section 203.140, RSMo Supp. 1973, may require that a permit or other approval be obtained from such city or county before a state agency may construct an air contaminant source within the boundaries of that city or county.
<a href="#">71-76</a>	Mar 29		Opinion letter to the Honorable John T. Russell
<a href="#">74-76</a>	May 25		Opinion letter to Mr. J. Neil Nielsen
<a href="#">74a-76</a>	June 28		Opinion letter to Mr. J. Neil Nielsen
<a href="#">75-76</a>	Nov 23		Opinion letter to Mr. J. Neil Nielsen
<a href="#">76-76</a>	Oct 27	TAXATION (SALES & USE).	The Missouri Director of Revenue is not authorized to impose penalties and/or interest in addition to sales or use tax as provided in the sales tax statutes, Sections 144.010 to 144.510, RSMo 1969, on those individuals who fail to apply for a certificate of ownership on a newly acquired automobile within thirty days from the date of purchase, as required by Section 301.190, RSMo 1969. The only penalty collectible,

			if the certificate of ownership is not applied for within thirty days from the date of purchase, is that provided for in Section 301.190(3), RSMo, i.e., a penalty of five dollars for each month or fraction of a month of delinquency not to exceed twenty-five dollars.
<a href="#">77-76</a>	July 13	SCHOOLS.	In determining the "total amounts received by school districts under the provisions of this section" as required by subsection 8 of Section 163.031 the State Board of Education must take into account for any district entitled thereto the protection afforded by subsection 4 of Section 163.031.
78-76			Withdrawn
<a href="#">79-76</a>	May 19		Opinion letter to the Honorable Daniel J. O'Toole
<a href="#">80-76</a>	Oct 19	DEPARTMENT OF MENTAL HEALTH. DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION. HANDICAPPED CHILDREN. SCHOOLS.	The school district of residence of a handicapped child's parents or guardian must pay to the Department of Mental Health the local tax effort per child of that district when the handicapped child has been admitted to the programs or facilities of the Department. If a district is billed by the Department of Mental Health and there is a dispute over whether the child's parents live in the billed district, the dispute between the district and the Department should be resolved within the ninety-day period provided in Section 162.970, RSMo Cum. Supp. 1975. After the expiration of the ninety-day period, all delinquent districts should be certified by the Department of Mental Health to the State Board of Education. The State Board of Education, in reliance on that certification, should deduct from subsequent payments of state aid to the delinquent district the amount owed to the Department and remit that amount to the Department of Mental Health.
<a href="#">81-76</a>	May 20	STATE AUDITOR. REORGANIZATION ACT.	(1) The Bi-State Development Agency of the Missouri-Illinois Metropolitan District and the Kansas City Area Transportation Authority of the Kansas City Area Transportation District should not be included within the scope of an audit of the Missouri Department of Transportation, conducted pursuant to Section 29.200, RSMo. (2) The Missouri-St. Louis Metropolitan Airport Authority should be included within the scope of an audit of the Missouri Department of Transportation, conducted pursuant to Section 29.200, RSMo. (3) The Missouri-Tennessee Bridge Commission, the Missouri-Illinois (Canton) Bridge Commission, the Missouri-Illinois (Ste. Genevieve) Bridge Commission, and the Missouri-Illinois-Jefferson-Monroe Bridge Commission should not be included within the scope of an audit of the Missouri Department of Transportation, conducted pursuant to Section 29.200, RSMo.
<a href="#">82-76</a>	June 28		Opinion letter to the Honorable Robert A. Young

<a href="#">83-76</a>	Apr 7		Opinion letter to the Honorable Russell Goward
84-76			Withdrawn
<a href="#">85-76</a>	May 5		Opinion letter to Mr. W. Dale Burke
<a href="#">86-76</a>	Apr 14		Opinion letter to the Honorable Clarence H. Heflin
<a href="#">92-76</a>	Dec 9	JUDGMENTS. MOTOR VEHICLES. MOTOR VEHICLE SAFETY RESPONSIBILITY LAW.	Chapter 303, RSMo, requires the Director of Revenue to suspend a person's driver's license and registration upon receipt of a certified copy of a final judgment pursuant to Sections 303.090, 303.100, and 303.110, RSMo 1969, when said judgment is rendered against that person by a court of competent jurisdiction of any state or of the United States as a result of a claim for damages arising out of the ownership, maintenance, or use of any motor vehicle. There is no statutory requirement that the injury giving rise to said claim must either occur in this state or on the public highways and streets of this state.
<a href="#">93-76</a>	June 24		Opinion letter to Dr. Arthur L. Mallory
<a href="#">96-76</a>	May 12		Opinion letter to the Honorable Earl L. Schlef
<a href="#">98-76</a>	June 28		Opinion letter to the Honorable Charles J. Becker
<a href="#">99-76</a>	June 1		Opinion letter to the Honorable John E. Scott
<a href="#">100-76</a>	Dec 14	DEPARTMENT OF SOCIAL SERVICES. DIVISION OF CORRECTIONS. CONVICTS.	The Division of Corrections may not deposit the personal funds of inmates in a savings account in a bank and then use the interest generated therefrom to pay the maintenance costs of such an account and to deposit the remainder in an inmate canteen fund.
<a href="#">101-76</a>	Apr 29	APPROPRIATIONS. DEPARTMENT OF PUBLIC SAFETY.	The Department of Public Safety has no authority to spend any of the moneys appropriated in Section 16.320, House Bill No. 16, Second Regular Session, 78th General Assembly.
<a href="#">102-76</a>	June 8		Opinion letter to Dr. Arthur L. Mallory
<a href="#">103-76</a>	Sept 8	SUNSHINE LAW. POLITICAL COMMITTEES.	The St. Louis Republican Central Committee is a “public governmental body” as defined in Section 610.010(2), RSMo Supp. 1975, and is therefore subject to the open meeting requirement of that law.
<a href="#">104-76</a>	May 5		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">105-76</a>	May 5		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">106-76</a>	May 5		Opinion letter to the Honorable James C. Kirkpatrick
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<a href="#">107-76</a>	May 25		Opinion letter to Mr. James R. Spradling
<a href="#">108-76</a>	May 25		Opinion letter to the Honorable Omar Schnatmeier
<a href="#">109-76</a>	May 25		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">110-76</a>	June 7	COUNTY JUDGE. COUNTY OFFICERS.	A presiding judge of a county of the first class not having a charter form of government and not containing all or part of a city having a population of five hundred thousand inhabitants is required to devote his full time to the duties of his office under Section 49.080, RSMo Supp. 1975, but that such requirement does not mean that such officer is precluded from having other after-hours employment where such other employment does not conflict with, impair, or interfere with the performance of such officer's duties as presiding judge. County officers do not hold "part time" positions. They are required by law to personally devote their time to the performance of the duties of their offices. However, consistent with this requirement and unless otherwise prohibited by law, county officers may occupy other offices and engage in other activities which are compatible and not in conflict.
111-76			Withdrawn
<a href="#">112-76</a>	June 21	INSURANCE.	1. Insurance companies are required to pay a filing fee pursuant to Section 374.230(6), RSMo, for documents filed with the Director of the Division of Insurance pursuant to Sections 376.405, 376.675, 376.777, RSMo 1969 and Section 379.321, RSMo 1975 Supp.; 2. The filing fee imposed by Section 374.230(6) is for each document and not each page of each document; and 3. The filing fee paid pursuant to Section 374.230(6) is not, pursuant to Section 148.400, deductible from the premium tax payable by such companies.
<a href="#">113-76</a>	July 28		Opinion letter to Dr. Arthur L. Mallory
<a href="#">114-76</a>	Aug 4		Opinion letter to Dr. Arthur L. Mallory
<a href="#">115-76</a>	June 28		Opinion letter to Mr. Lawrence L. Graham
<a href="#">116-76</a>	June 25	COUNTY COURT. COUNTY JUDGES.	Under Section 49.070, RSMo, a majority of the judges of the county court constitute a quorum to transact business; and it is only when one associate judge is absent and the presiding judge and one associate judge are sitting for the transaction of business and they disagree on the matter submitted to them that the decision of the presiding judge shall stand as the decision of the court.
<a href="#">117-76</a>	June 4		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">119-76</a>	Nov 5	DEPARTMENT OF CORRECTIONS.	A marriage entered into by an inmate, while under sentence to the Missouri Department of Corrections, is valid if entered into pursuant to

		CONVICTS. CITIZENSHIP. MARRIAGE. DIVORCE.	the law of Missouri, particularly Chapter 451, RSMo 1969, and may be dissolved in accordance with Chapter 452, RSMo Supp. 1975.
<a href="#">120-76</a>	July 12		Opinion letter to Mr. James L. Wilson
<a href="#">122-76</a>	Aug 23	REORGANIZATION ACT. DEPARTMENT OF HIGHER EDUCATION.	The work of individuals, who perform duties for the Department of Higher Education, under work-release or work-internship programs, should be computed against the staff limitation contained in Section 6.2 of the Omnibus State Reorganization Act of 1974.
<a href="#">123-76</a>	Aug 16		Opinion letter to the Honorable James I. Spainhower
<a href="#">124-76</a>	June 11		Opinion letter to the Honorable Donald L. Manford
126-76			Withdrawn
<a href="#">128-76</a>	July 8	CORPORATIONS. AGRICULTURE. FARMING. BANKS.	A bank or other financial corporation acting as a trustee, as an executor, or in some other fiduciary capacity exercising control over agricultural land, must file reports with the Director of the Missouri State Department of Agriculture pursuant to Section 350.030, RSMo Supp. 1975.
<a href="#">129-76</a>	July 6	DEPARTMENT OF MENTAL HEALTH.	The Director of the Department of Mental Health, as appointed by the Mental Health Commission and confirmed by the Senate, is not required to be a physician competent in the field of mental health, administration, and program planning.
<a href="#">130-76</a>	July 6		Opinion letter to the Honorable John W. Buechner
<a href="#">131-76</a>	July 14		Opinion letter to the Honorable Edward C. Graham
<a href="#">132-76</a>	July 14	AMBULANCES. AMBULANCE DISTRICTS. ATTORNEYS.	An ambulance district created under the provisions of Sections 190.005, et seq., RSMo Supp. 1975, is authorized to employ private legal counsel.
<a href="#">133-76</a>	July 8	ELECTIONS. BALLOTS.	A ballot for a political party at the August Primary may contain more than one column so long as all the candidates for any office are listed in one column.
<a href="#">134-76</a>	Aug 6		Opinion letter to Dr. Arthur L. Mallory
<a href="#">135-76</a>	Aug 4		Opinion letter to the Honorable Hardin C. Cox
<a href="#">136-76</a>	July 28		Opinion letter to the Honorable Jack C. Bauer
<a href="#">138-76</a>	July 14		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">139-76</a>	July 21		Opinion letter to the Honorable David L. Zerrer

<a href="#">140-76</a>	Nov 23		Opinion letter to the Honorable Steve Lampo
<a href="#">141-76</a>	Aug 6	STATE FUNDS. STATE AUDITOR. WORKMEN'S COMPENSATION.	Income earned from investment of money in the Workmen's Compensation Fund, Section 287.710, RSMo, is required to be credited to that fund.
<a href="#">144-76</a>	July 27		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">145-76</a>	Aug 31	MOTOR VEHICLES.	Section 2 of House Bill 1514, 78th General Assembly, Second Regular Session, which provides that vehicles engaged in transporting solid waste as defined by Section 260.200, RSMo, between a city and a solid waste disposal area or solid waste processing facility approved by the Department of Natural Resources may operate with a weight not to exceed 22,400 pounds on one axle means that such weight is to be calculated per axle and the weight limitations imposed by Section 304.180, RSMo, are not applicable to such vehicles.
<a href="#">146-76</a>	Aug 17	COUNTIES. COUNTY COURT. COUNTY BUILDINGS.	Under Section 49.370, RSMo, the county court shall designate the place on which county buildings are to be erected at the seat of justice, and under Section 49.380, RSMo, the superintendent of county buildings appointed under Section 49.330, RSMo, has the authority to select a place anywhere within the corporate limits of the town known as the county seat if there is no suitable ground for the purpose intended belonging to the county within the limits of the original town known as the established seat of justice.
147-76			Withdrawn
<a href="#">148-76</a>	Oct 2		Opinion letter to the Honorable George E. Murray
<a href="#">149-76</a>	Oct 6	TAXATION (SALES & USE).	The Director of Revenue does not have the right or duty to grant a use tax exemption in the case in which an individual transfers motor vehicles to a corporation in which he owns one hundred percent of the stock and the corporation assumes the outstanding liability on said motor vehicles.
<a href="#">150-76</a>	Oct 6	DENTISTS.	A graduate of a foreign dental school is qualified for examination and registration as a dentist in the state of Missouri under the provisions of Section 332.131, RSMo, only if the school is certified by the American Dental Association.
<a href="#">152-76</a>	Sept 22		Opinion letter to Col. Theodore D. McNeal
<a href="#">153-76</a>	Aug 16		Opinion letter to the Honorable Jack E. Gant
<a href="#">155-76</a>	Oct 8	CONSTITUTIONAL LAW. MISSOURI COUNCIL	The Missouri State Council on the Arts may contract with artists for workshops, lectures, demonstrations, performances and art objects without violating Article III, Section 38(a) of the Missouri Constitution.

		ON THE ARTS.	
<a href="#">156-76</a>	Aug 18	CLEAN WATER. REORGANIZATION LAW.	The initial responsibility for issuing Clean Water Commission permits under Section 204.051, RSMo Supp. 1975, rests with the Director of the Department of Natural Resources acting in his capacity of administering Department of Natural Resources programs relating to environmental control and executing policies established by the Clean Water Commission.
<a href="#">159-76</a>	Dec 21	INSURANCE.	The requirements of Section 379.120, RSMo Supp. 1975, apply to insurers canceling automobile insurance policies which have been in effect for less than sixty days.
<a href="#">160-76</a>	Nov 23		Opinion letter to the Honorable James L. Russell
<a href="#">161-76</a>	Sept 8		Opinion letter to Mr. Alfred C. Sikes
<a href="#">163-76</a>	Aug 16		Opinion letter to the Honorable John T. Russell
<a href="#">164-76</a>	Sept 28		Opinion letter to Dr. Arthur L. Mallory
166-76			Withdrawn
167-76			Withdrawn
<a href="#">168-76</a>	Nov 12	COUNTIES. COUNTY COURT. COUNTY JUDGES.	The provision in subsection 4 of Section 50.540, RSMo, of the County Budget Law which requires a unanimous vote of the county court to approve an unforeseen emergency transfer of funds from the emergency fund to another appropriation means that both judges must so vote if only two judges are present and that if all three judges are present, a yes vote by all three judges or a yes vote by two judges and silence by one judge constitutes a unanimous vote.
<a href="#">169-76</a>	Aug 30		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">171-76</a>	Sept 7		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">176-76</a>	Sept 28		Opinion letter to Mr. J. Neil Nielsen
<a href="#">178-76</a>	Nov 10	SCHOOLS.	Contracting school districts are obligated to pay the tuition fee prescribed in Section 178.510, RSMo, for those nonpublic school pupils residing within their boundaries who are over the age of 16 years and who desire to attend area vocational schools on a part-time basis.
<a href="#">179-76</a>	Oct 5	ELECTIONS. REGISTRATION.	Any registered voter in a county coming within the purview of Chapter 114, RSMo Supp. 1975, who changes his address prior to the closing of voter registration for a particular election, must apply to the county clerk and have his voter registration changed as provided for in Section 114.016, RSMo Supp. 1975, in order for him to vote in that election and he is not permitted to vote in the polling place where he formerly resided.



<a href="#">180-76</a>	Sept 25	ELECTIONS. CANDIDATES.	No legal vacancy exists under Section 120.550, RSMo, when an ineligible person files for and is purportedly nominated as the candidate for the office of county district judge and thereafter resigns such purported nomination and therefore a party committee has no legal authority to fill such purported vacancy.
182-76			Withdrawn
184-76			Withdrawn
<a href="#">185-76</a>	Sept 29	STATE AUDITOR. APPROPRIATIONS.	Money may be disbursed from an appropriation for a subsequent fiscal year to pay for goods and services received and which constituted a legal claim in a previous fiscal year, if the subject matter of payment is otherwise within the purpose of the appropriation. A special appropriation, expressly for the purpose of satisfying the debt, is not, therefore, the only means of payment for such legal debt.
<a href="#">186-76</a>	Dec 7	CONSTITUTIONAL LAW. SCHOOL TRANSPORTATION.	State funds may lawfully be distributed to public school districts in order to defray part of the cost of transporting children to and from public schools.
<a href="#">187-76</a>	Sept 21	STATE AUDITOR. GOVERNOR. ELECTIONS. OFFICERS.	Section 29.280 determines the manner in which a vacancy in the office of State Auditor will be filled. Pursuant to that section the Governor is required to appoint a successor to serve for the remainder of the unexpired term.
<a href="#">188-76</a>	Oct 5		Opinion letter to the Honorable R. L. Usher
<a href="#">189-76</a>	Nov 15		Opinion letter to the Honorable Donald L. Manford
<a href="#">190-76</a>	Nov 30		Opinion letter to the Honorable George Dames
<a href="#">191-76</a>	Oct 19		Opinion letter to the Honorable Larry Mead
192-76			Withdrawn
<a href="#">195-76</a>	Nov 23	MOTOR VEHICLES. DEPARTMENT OF PUBLIC SAFETY.	1. The Director of Public Safety has the authority to approve or disapprove the use of the Deceleration Alert System on motor vehicles in this state pursuant to the provisions of Section 307.030, RSMo 1969. 2. The use of the Deceleration Alert System on motor vehicles operated within this state would not violate any laws of the state of Missouri.
<a href="#">198-76</a>	Oct 13		Opinion letter to the Honorable W. E. Lewis
<a href="#">199-76</a>	Oct 13		Opinion letter to Mr. Alan C. Kohn
<a href="#">200-76</a>	Dec 21	LIBRARIES. CITY LIBRARIES.	In cases where the boundaries of a municipal library district do not encompass the entire city in which it is located, the trustees of the municipal library district must be residents of such district.

<a href="#">203-76</a>	Oct 19		Opinion letter to the Honorable Emory Melton
<a href="#">208-76</a>	Dec 1		Opinion letter to the Honorable Hal E. Hunter, Jr.
<a href="#">211-76</a>	Oct 26		Opinion letter to the Honorable Vernon Betz
<a href="#">216-76</a>	Nov 12	ELECTIONS. CANDIDATES.	When a candidate for associate county judge is nominated at the August primary and attempts to withdraw as a candidate less than forty-three days prior to the date of the general election such attempted withdrawal is a nullity and void and his name is to be printed on the general election ballot.
<a href="#">217-76</a>	Nov 4		Opinion letter to the Honorable Donald L. Manford
<a href="#">221-76</a>	Nov 23		Opinion letter to Mr. Raymond M. Weber
<a href="#">223-76</a>	Dec 22	TAXATION. COMPENSATION. COUNTY COLLECTORS.	None of the commissions provided for collectors of third and fourth class counties not having township organization under the provisions of the subsections of Section 52.260, RSMo Supp. 1975, apply to the collection of current delinquent taxes and such collectors are entitled to only the commissions provided in Section 52.290, RSMo, for collecting such taxes.
<a href="#">224-76</a>	Dec 21		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">226-76</a>	Nov 23		Opinion letter to Dr. Arthur L. Mallory



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 19, 1976

OPINION LETTER NO. 1

Honorable Richard M. Webster  
Missouri Senate, District 32  
Room 434, Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Webster:

This is in answer to your opinion request concerning Section 226.530, RSMo, which concerns rules and regulations of the State Highway Commission applicable to outdoor advertising. Such section provides in part as follows:

" . . . Such commission rules and regulations shall be filed in the office of secretary of state of the state of Missouri. Such rule or regulation, or any amendment thereto shall become interimly effective thirty days after such filing, and shall remain in effect pending amendment, approval or rejection by the general assembly in the next regular or special session."

The language of the section is confusing in that it states that the rule or regulation or any amendment thereto shall remain in effect pending "amendment, approval or rejection" by the General Assembly. The concept of a rule's remaining in effect pending "approval" would indicate that if approval were not given the rule or regulation would expire. The use of the term "rejection" would indicate that if the rule were not rejected it would remain in effect. The use of the word "amendment" would indicate that the legislature purports to have the power to change in part a rule promulgated by the State Highway Commission.

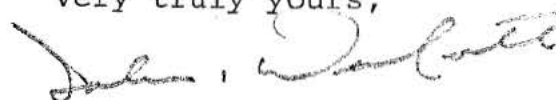
The legislature can at any time enact a statute which invalidates a rule promulgated by any agency which is not promulgated

Honorable Richard M. Webster

under a constitutional provision. The legislature can in a sense "approve" a rule by enacting the provisions of such rule into law. Further, a rule can be "amended" by a statute which contains provisions in part contrary to the rule and in such case the statute would prevail over such contrary provisions of the rule. Such action can be taken by the legislature at any time in any session after the promulgation of the rule except that, of course, a statute cannot be enacted at a special session of the General Assembly unless the subject matter of the statute is within the call of the Governor. It is axiomatic that one General Assembly cannot restrict the action of a succeeding General Assembly, The State ex rel. Walker v. Walker, 88 Mo. 279 (1885). It is our view that the legislative intent of Section 226.530, in the premises, is that the action of the General Assembly in approving, rejecting or amending a rule promulgated by the State Highway Commission is that the approval, rejection or amendment must be by a statute duly enacted with provisions that are the same as the rule, contrary to the rule, or in part contrary to the rule.

Further, we are of the view that a rule promulgated by the State Highway Commission under the authority of Section 226.530, cannot be affected by a joint resolution of the General Assembly. This is because under Section 21 of Article III of the Missouri Constitution no law can be passed except by bill. We cannot, in these premises, conclude that the General Assembly intended to enact permanent substantive legislation by the use of a joint resolution. We conclude that such rules remain effective until the General Assembly passes legislation invalidating them in whole or in part.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

May 19, 1976

OPINION LETTER NO. 3

Mr. Theodore L. Johnson III  
County Counselor, Greene County  
Post Office Box 4302 G.S.  
Springfield, Missouri 65804

Dear Mr. Johnson:

This opinion letter is in response to your request in which you ask:

"Is Springfield Workshops, Inc. exempt from real estate and personal property taxes?"

You have furnished us with information from the attorney for the Springfield Workshops, Inc., which states as follows:

"Springfield Workshop, Inc. is a corporation organized under 'General Not For Profit Corporation Law' of the State of Missouri. It received its Certificate of Incorporation on January 19, 1966.

"Springfield Workshop, Inc. operates under the supervision of the Missouri Department of Education under the provisions of §178.900 to §178.970 V.A.M.S., entitled 'Sheltered Workshops'. It provides work in a sheltered environment for mentally retarded and handicapped persons whose limited capabilities make them not employable in competitive business and industry and unsuited for vocational rehabilitation training. Approximately 150 handicapped and retarded persons are employed at the workshop.

Mr. Theodore L. Johnson

"The property in question is used exclusively for the purposes of the workshop as defined in §178.910 V.A.M.S. Springfield Workshop, Inc. has no shareholders. Its operations are supervised by an uncompensated Board of Directors. Springfield Workshop Inc. receives funds from the State of Missouri, currently at the rate of \$3.00 per day per handicapped worker, and receives income from the businesses for which it performs services. The money that the workshop receives is used for salaries of the handicapped workers, purchase of its building and operating expenses.

"Springfield Workshop, Inc. is exempt from Federal Income Taxes as provided by §501.(c) (3) of the Internal Revenue Code which exempts corporations operated exclusively for charitable and educational purposes."

The statutory provision relative to such exception is contained in subsection 5 of Section 137.100, V.A.M.S., which provides:

"The following subjects are exempt from taxation for state, county or local purposes:

\* \* \*

"(5) All property, real and personal, actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes;"

It has been said that one ground on which such a statute can be justified in the constitutional sense is that charitable institutions administer to human and social needs which the state might and does undertake to do so that the ultimate obligation of the state is discharged by the private charity. Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365 (Mo. 1969). See also Section 6, Article X, Missouri Constitution.

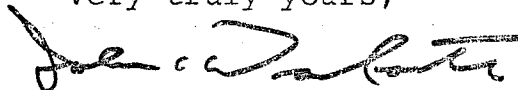
Mr. Theodore L. Johnson

It was also held in Townhouse, that each tax exemption case is peculiarly one which must be decided upon its own particular facts. From the Articles of Incorporation and the facts that we have it is clear that the workshop provides an obvious public service. Further, the Statement of Receipts and Expenditures for the years 1969 through 1975, which has been furnished us, additionally lead us to conclude that the workshop falls within the holding of Missouri Goodwill Industries v. Gruner, 210 S.W.2d 38 (Mo. 1948), and is within the tax exemption provisions of Section 137.100.

In reaching this conclusion, we recognize that the fact that the federal government does not tax the income derived from the property is not persuasive. Townhouse, supra. However, it appears reasonable to conclude that such an organization which performs a vital function in providing workshops for handicapped persons under Sections 178.900, et seq., RSMo, would reasonably be a charitable institution within our tax exemption statutes. In this respect we observe that although tax exemption statutes are strictly construed they must nevertheless be reasonably construed. Missouri Goodwill Industries, supra.

We therefore conclude under the facts furnished us that Springfield Workshops, Inc. is exempt from taxation pursuant to the provisions of Section 137.100.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

December 23, 1976

OPINION LETTER NO. 4

Answer by Letter - Klaffenbach

Honorable James Millan  
Prosecuting Attorney  
Pike County Courthouse  
Bowling Green, Missouri 63334



Dear Mr. Millan:

This is in response to your request for an opinion from this office as follows:

"May a Recorder record an instrument which does not affect title to real estate even though that instrument has not been notarized or acknowledged?

"May a Recorder of Deeds record any instrument which does affect title to real estate if it has not been notarized or acknowledged?

"The Recorder of Deeds of Pike County has received on several occasions various instruments which are not notarized or acknowledged but which are presented for recording. He has customarily refused to record these documents in view of the contents of Section 59.330 which sets forth the requirements of instruments to be recorded and in view of the opinions of your office and the cases in connection therewith noted under footnote two (acknowledgments of instruments) in the annotated statutes thereof. However, Section 490.340 of the Revised Statutes of Missouri would seem to presuppose that he can accept



Honorable James Millan

documents which have not been acknowledged nor approved according to law."

With respect to your first question as to whether or not a recorder may record an instrument which does not affect title to real estate even though the instrument has not been notarized or acknowledged, it is clear that it is a matter of common knowledge that many provisions of the statutes require or authorize instruments and documents to be filed or recorded in a recorder's office other than those specifically referred to in Section 59.330, RSMo. This fact is readily illustrated by the cross references given in Vernon's Annotations to that section.

We enclose Opinion No. 44, dated March 6, 1964, to Blackwell, which answers in part your second question asking whether or not a recorder of deeds may record any instrument which does affect title to real estate if it is not notarized or acknowledged.

We also enclose Opinion No. 234, dated October 18, 1965, to Barton; Opinion No. 269, dated June 18, 1968, to Whipple; Opinion No. 154, dated June 22, 1965, to Baldrige; Opinion No. 81, dated May 26, 1941, to Sherrod; Opinion No. 83, dated April 21, 1939, to Smith; Opinion No. 54, dated November 28, 1938, to Long; Opinion No. 61, dated July 26, 1935, to Mead; and Opinion No. 83, dated November 1, 1935, to Senti, all of which are self-explanatory. The answer to your second question then is that any document which affects title to realty is entitled to be recorded if it meets the conditions precedent to recording imposed by law. We caveat, however, in reaching this conclusion that the title examination standards of the Missouri Bar, V.A.M.S. Appendix, Chapter 442, should be taken into consideration. And, the recorder must bear in mind in reaching his individual determinations that Sections 59.650 and 59.660 impose liability and penalty provisions on him for neglect of duty. Therefore, the recorder clearly has the burden of making responsible individual decisions, and we do not purport to direct him as to his duties in each particular case which may come before him.

We point out that the delay in responding to your request has been caused by the relative broadness of your question and the impracticality of this office rendering a comprehensive opinion as to just what particular documents may or must be filed under the various statutes.

Primarily, your question arises out of the problem created by an interpretation of Section 490.340, RSMo, which was discussed

Honorable James Millan

comprehensively in Hatcher v. Hall, 292 S.W.2d 619 (Spr.Ct.App. 1956). In 1959, Section 490.340 was amended so that the language differed from that upon which the court ruled in the Hatcher case, and the legislature inserted in the first line of that sentence the words "or hereafter" which made such statute also one which operated prospectively. It is our view that that statute, however, does not in and of itself repeal or amend Section 59.330. That is, we view Section 490.340 as imparting notice of the contents of such defectively executed documents which come within the purview of that section to the same extent as would an identical recorded instrument or copy which is duly certified. That section does not make it the duty of the recorder to accept instruments which are not properly certified, or which are defectively certified, and not entitled to be recorded.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 44, 3-6-64, Blackwell  
Op. No. 234, 10-18-65, Barton  
Op. No. 269, 6-18-68, Whipple  
Op. No. 81, 5-26-41, Sherrod  
Op. No. 83, 4-21-39, Smith  
Op. No. 54, 11-28-38, Long  
Op. No. 61, 7-26-35, Mead  
Op. No. 83, 11-1-35, Senti  
Op. No. 154, 6-22-65, Baldrige



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
JEFFERSON CITY

January 26, 1976

OPINION LETTER NO. 5

Honorable Jerold L. Drake  
Representative, District 5  
c/o House Post Office, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Drake:

This is in response to your request for an opinion from this office as follows:

"Does a township board have power to approve the utilization of a public road as a levee by a private landowner for a private purpose and thereby completely eliminate the ditch beside the road as a waterway contrary to R.S.Mo. section 229.150.

"Certain landowners have erected levees to protect their lands from the flooding 102 river in Nodaway County, Missouri. The levees run from the bluff on the east to a township road on the west. The road itself has been utilized as a levee running north and south and joins up with east-west levees above described. In some instances the road itself was raised. The ditch on the east side of the road has been virtually eliminated and no water can enter it from the lands of adjoining landowners. The effect of the levees will be to aggravate flooding on other lands since water cannot get into the ditch and be carried back to the river. The levee construction has taken place in Grant township (Nodaway County) but the flooding will occur in Polk township (Nodaway County). The levees were constructed with approval of the Grant township governing body."

Honorable Jerold L. Drake

Nodaway County is a third class county under township organization.

For the purposes of this opinion, we will assume that the road in question is a public road and under the control and supervision of a township board of directors.

Section 231.150, RSMo 1969, provides that all road laws of this state shall apply to counties under township organization unless otherwise specified.

Section 231.160, RSMo 1969, provides for the township board of directors to appoint a road overseer for each road district.

As we understand the facts of the matter under consideration, private landowners have constructed levees that join up at right angles with the public road by extending their levee onto the public road and thus eliminating the side ditch along the side of the road and preventing the water from escaping from said ditch. You inquire whether the township board has the power and authority to approve such levee under the provisions of Section 229.150, RSMo 1969.

Section 229.150, RSMo, provides as follows:

"1. All driveways or crossings over ditches connecting highways with the private property shall be made under the supervision of the overseer or commissioners of the road districts.

"2. Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right-of-way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right-of-way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.

Honorable Jerold L. Drake

"3. The road overseer of any district, or county highway engineer, who finds any road obstructed as above specified, shall notify the person violating the provisions of this section, verbally or in writing, to remove such obstruction. Within ten days after being notified, he shall pay the sum of five dollars for each and every day after the tenth day if such obstruction is maintained or permitted to remain; such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction."

We are enclosing herewith Opinion No. 21 issued February 1, 1940, to Donald B. Dawson, in which we considered the above-statutory provision which rules that it is the duty of the road overseer to remove any and all obstructions on any of the public roads in his district in a township organization county.

We are also enclosing Opinion No. 424 issued November 18, 1970, to Lee E. Norbury, to the effect that a county court or a highway officer has no authority to surrender the use of a highway for private purposes such as to permit the flooding of a public road by watershed subdistricts.

We are also enclosing Opinion No. 201 issued May 10, 1974, to Michael L. Shortridge in which we referred to Camden Special Road Dist. of Ray County v. Taylor, 495 S.W.2d 93 (Mo.Ct.App. at K.C. 1973) which held that under the common enemy doctrine landowners have the right to construct levees on their property to ward off surface water from their property even though the indirect result of doing so was to back surface water onto the public road. However, in that case the levee was constructed entirely upon the private property and not upon a public road which distinguishes that case from the facts under consideration.

We are enclosing herewith Opinion No. 58 issued June 2, 1953, to Leon McAnally, to the effect that any person who willfully and knowingly deposits refuse in the side drainage ditches of a public road, which obstructs the flow of water therein regardless of whether the road is damaged or the traveled portion is obstructed, is punishable under Section 229.150, RSMo.

The township board of directors in a county under township organization are public officers and have only such powers and authority as expressly given them by statute and that which is necessary to perform those expressly granted.

Honorable Jerold L. Drake

It is our view that when drainage is provided and side ditches are established for public roads the public agency in charge does have the right under Section 229.150, RSMo, to remove any obstruction from the side ditch that obstructs the flow of water in the side ditch.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 21  
Dawson, 2-1-40

Op. No. 424  
Norbury, 11-18-70

Op. No. 201  
Shortridge, 5-10-74

Op. No. 58  
McAnally, 6-2-53

COMPENSATION:  
REORGANIZATION ACT:  
MISSOURI HIGHWAY RECIPROCITY COMMISSION:

The Omnibus State Reorganization Act of 1974 authorizes the Director of Revenue to approve

all salary increases for employees of the Missouri Highway Reciprocity Commission.

OPINION NO. 6

February 6, 1976

Mr. James R. Spradling, Director  
Department of Revenue  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This opinion is in response to your question asking as follows:

"Does the Director of Revenue have the authority to approve all salary increases for employees of the Highway Reciprocity Commission?"

You also state:

"Section 301.273 RSMo 1969, authorizes the Highway Reciprocity Commission to fix the compensation of the secretary for the commission and other employees. However, paragraph 5, Section 12, Omnibus State Reorganization Act transfers all the powers, duties and functions of the Highway Reciprocity Commission, Chapter 301 RSMo, by type II transfer to the Department of Revenue. The definition of a type II transfer given in Section 1.7(1)(b) of the Reorganization Act includes '...the employment and discharge of employees,....' In addition, Section 1.6(4)(a) of the Reorganization Act gives the Department of Revenue '...exclusive budget-making powers...for each... commission....' It is not clear whether the budget-making power of the Department of Revenue or the authority to supervise the employment and discharge of employees includes supervision over and determination of any salary increases for those employees."

Mr. James R. Spradling

As you have noted under the provisions of Section 301.273, RSMo, the Missouri Highway Reciprocity Commission, which is composed of the Governor, the Attorney General, the Chairman of the Public Service Commission, the Director of Revenue, the Superintendent of the Missouri State Highway Patrol, and the Chief Engineer of the Highway Department, has the authority to ". . . fix the compensation of . . . employees within the amount appropriated by the general assembly."

Also, as you have noted, the provisions of the Omnibus State Reorganization Act of 1974 (C.C.S.H.C.S.S.C.S.S.B. No. 1, 77th General Assembly), subsection 5 of Section 12 provide:

"All the powers, duties and functions of the highway reciprocity commission, chapter 301, RSMo, are transferred by type II transfer to the department of revenue."

The Reorganization Act also provides, subsection 7(b) of Section 1:

"Under this act a type II transfer is the transfer of a department, division, agency, board, commission, unit, or program to the new department in its entirety with all the powers, duties, functions, records, personnel, property, matters pending, and all other pertinent vestiges retained by the department, division, agency, board, commission, unit or program transferred subject to supervision by the director of the department. Supervision by the director of the department under a type II transfer shall include, but shall be limited to: budgeting and reporting under subdivisions (4) and (5) of subsection 6 of this section; to abolishment of positions, other than division, agency, unit or program heads specified by statute; to the employment and discharge of division directors; to the employment and discharge of employees, except as otherwise provided in this act; to allocation and reallocation of duties, functions and personnel; and to supervision of equipment utilization, space utilization, procurement of supplies and services to promote economic and efficient administration and operation of the department and of each agency within the department. Supervision by the director of the department



Mr. James R. Spradling

under a type II transfer shall not extend to substantive matters relative to policies, regulative functions or appeals from decisions of the transferred department, division, agency, board, commission, unit or program, unless specifically provided by law. The method of appointment under type II transfer will remain unchanged unless specifically altered by this act or later acts." (Emphasis added)

It is our view that it is particularly significant that the legislature granted the Director the authority to employ and discharge employees under a type II transfer because we believe that the power to employ personnel necessarily includes the fixing of employee compensation in positions not covered by the merit system. While it is axiomatic that repeals by implication are not favored, we conclude that the reorganization provisions noted above repealed by implication the Commission's authority to set the compensation of its employees because such provisions vest that power in the Director of the Department of Revenue.

Such a conclusion, we believe, is consistent with the intent of the legislature in effecting reorganization.

#### CONCLUSION

It is the opinion of this office that the Omnibus State Reorganization Act of 1974 authorizes the Director of Revenue to approve all salary increases for employees of the Missouri Highway Reciprocity Commission.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

January 19, 1976

OPINION LETTER NO. 7

Mr. John Brawley, Director  
Department of Transportation  
Broadway Office Building, 4th Floor  
Jefferson City, Missouri 65101

Dear Mr. Brawley:

This letter is in response to your request as stated:

"(1) Does the Department of Transportation have the authority to charge a fee to cover the costs of an aeronautical chart and directory of aviation facilities in the state?

"(2) If so, are the proceeds deposited in the general revenue fund?"


You have informed us that your department has prepared an aeronautical chart of airports in the state and an airport directory of state airports. You have asked if your department has authority to charge a fee to cover the expense of preparation and handling.

We enclose a copy of Opinion No. 37, rendered June 13, 1949, to David E. Harrison, the holding of which we believe is applicable in the premises. You will note that the opinion points out that the law is well established that a fee may be charged by a public official for the rendition of services only when expressly provided for by statute. In view of the fact that we find no statutory authorization for the Department of Transportation to make a charge for copies of the chart, it is our view that the department has no authority to do so.

Mr. John Brawley

In view of our holding as to the first question, it is unnecessary to answer the second question.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 37,  
6-13-49, Harrison



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

April 5, 1976

OPINION LETTER NO. 8

JOHN C. DANFORTH  
ATTORNEY GENERAL

Dr. Arthur L. Mallory  
Commissioner of Education  
Department of Elementary and  
Secondary Education  
6th Floor, Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This is in response to your request for an opinion from this office as follows:

"Is a board of education that has authorized the borrowing of funds for the use of the district under provisions of section 165.131, RSMo, required to repay the loan within the calendar year in which the loan was made?

"Prior to July 1, 1974, school districts, other than urban districts, had no statutory authority to issue tax anticipation notes. However, the Missouri Supreme Court held in First National Bank of Stoutland v. Stoutland School District R-II (319 S.W. 2d 570) that all districts not authorized to issue tax anticipation notes could borrow money by virtue of a self-enforcing provision of the Missouri Constitution. However, such a loan would have to be repaid during the calendar year in which the loan was made."

As stated in your opinion request, prior to July 1, 1974, school districts, other than urban districts, had no statutory authority to

Dr. Arthur L. Mallory

issue tax anticipation notes. As we construe the Supreme Court decision in First National Bank of Stoutland v. Stoutland School District R2, 319 S.W.2d 570 (Mo. 1958), the court's opinion held school districts had constitutional authority to borrow money in an amount not exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years to be repaid from income and revenue provided for such year. It did not hold that the loan had to actually be repaid during the calendar year in which it was made. See State of Missouri ex rel. Strong, et al. v. Cribb, 273 S.W.2d 246 (Mo.Banc. Nov. 1954). Compare Grand River Tp., De Kalb County v. Cooke Sales & Service, Inc., 267 S.W.2d 322 (Mo. Div. No. 1, Apr. 1954) and dissenting opinion Hyde, J., in State of Missouri ex rel. Strong, et al. v. Cribb, supra at 251.

As heretofore stated, the legislature enacted Section 165.131, RSMo, providing for the issuing of tax anticipation notes by any school district as follows:

"The board of education of any school district in this state, upon a vote of a majority of the members of the board, may borrow funds for the use of the various funds of the district, including the debt service fund, and may issue negotiable notes in evidence thereof, payable out of the revenues derived from school taxes, for the purposes of the funds of any year in which the notes are issued. The notes may be issued at any time or from time to time between June thirtieth and December thirty-first in any year. A separate note shall be issued to evidence the borrowing for the benefit of each fund, and shall bear on its face appropriate reference to or designation of the fund for the use of which the funds evidenced by the note are borrowed. The aggregate principal amount of the notes issued in any year for the use or benefit of any fund shall not exceed fifty percent of the amount of the school board's estimate of the requirements for the fund and of the tax required to be levied for the purposes made for such year, including, however, the amount to be derived from any increases in rate of levy authorized by the electors of the district. The notes shall be payable in not to exceed six months from date of issue, and may bear interest at a rate not to exceed

Dr. Arthur L. Mallory

four percent per annum, payable at maturity. The proceeds of the notes shall be placed to the credit of the respective funds for the use and benefit of which the borrowing was made, as evidenced by the notes, and subject to the right to make transfers from and to funds as otherwise permitted by law, the proceeds of the notes shall be used and expended only in payment of the expenses and obligations properly payable from the funds respectively, and incurred or to be incurred against the funds during the year for the expenses of the year, or in payment of principal and interest on the notes. The notes may be payable to bearer or to the order of a named payee, and may be in substantially the following form:

TAX ANTICIPATION NOTE  
FOR \_\_\_\_\_ FUND

\_\_\_\_\_ School District of \_\_\_\_\_ County,  
State of Missouri  
No. \_\_\_\_\_ Date of issue \_\_\_\_\_ \$ \_\_\_\_\_

The \_\_\_\_\_ School District of \_\_\_\_\_  
County, Missouri, will pay on \_\_\_\_\_ at  
the office of the Treasurer of said School  
District, or at the \_\_\_\_\_ Bank in \_\_\_\_\_,  
to (bearer; or \_\_\_\_\_ or order), the sum of  
\_\_\_\_\_ with interest thereon from date of is-  
sue at the rate of \_\_\_\_\_% per annum, payable at  
maturity, out of funds derived from taxes for  
school purposes for the \_\_\_\_\_ fund, for the  
school year beginning July 1, 19\_\_\_\_, upon due  
and proper endorsement and presentment hereof.

THE \_\_\_\_\_ SCHOOL DISTRICT  
BY \_\_\_\_\_  
President

ATTEST:

\_\_\_\_\_  
Clerk or Secretary"

Under this statute, tax anticipation notes may be issued at any time or from time to time between June 30 and December 31 in any year and the notes shall be payable in not to exceed six months from date of issue and payable at maturity.

Dr. Arthur L. Mallory

As we construe this statute, any school board may issue tax anticipation notes on July 1 and any time thereafter until December 31 which notes shall be payable in not to exceed six months from the date of issue.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

January 14, 1976

OPINION LETTER NO. 10  
Answer by Letter - C. A. Blackmar

Mr. William J. Raftery, Director  
Division of Accounting  
Room 125, Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Raftery:

This opinion letter is in response to your request on the following question:

"Are the Area Agencies on Aging (AAA), established pursuant to the Older Americans Act of 1965, instrumentalities of the State for purposes of Section 218 of the Social Security Act, 42 U.S.C.A. §418?"

In the request for the opinion you state that the opinion is sought in order to assure that the State of Missouri meets the requirements of the contract between the state and the Secretary of Health, Education and Welfare with respect to providing Social Security coverage for state employees. That agreement was entered into pursuant to the authority contained in Section 105.440, RSMo.

In order to determine whether or not the state is obligated to provide Social Security coverage for employees of Area Agencies on Aging, it must be determined whether those entities are instrumentalities of the State of Missouri. We are advised that the Area Agencies on Aging are organized as not-for-profit corporations pursuant to Chapter 355, RSMo. The indispensable characteristic of an instrumentality of the State of Missouri is that it be created by the state pursuant to law. Therefore,



Mr. William J. Raftery

we do not believe that such entities are "instrumentalities" as that term is used in Sections 105.300, RSMo et seq., and the state is not obligated, and indeed not permitted, to contract with the federal government for Social Security coverage for employees of such entities.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

January 20, 1976

OPINION LETTER NO. 11

Mr. Alan C. Kohn  
Chairman, Missouri Housing  
Development Commission  
20 West 9th Street, Suite 934  
Kansas City, Missouri 64105

Dear Mr. Kohn:

This letter is in response to your question asking:

"Can funds appropriated by H.B. No. 4 (1973) to MHDC for 'initial funding of the Missouri Housing Development Commission Mortgage Insurance Reserve Fund' be pledged as additional security for a particular MHDC bond or note issue?"

As you point out in your question, the appropriation at issue was made by the 77th General Assembly to the Missouri Housing Development Commission (MHDC) for the initial funding of the Missouri Housing Development Commission Mortgage Insurance Reserve Fund (the "Fund") from the Revenue Sharing Trust Fund in the amount of one million dollars. In our Opinion No. 285, dated November 14, 1973, to Mr. Peter Salsich, this office considered the constitutional validity of the appropriation and found such appropriation to be constitutional.

It is our understanding that MHDC has drawn down the amount appropriated to the Fund and has maintained the Fund in a segregated account which has been invested. To finance its activities, MHDC proposes to issue approximately 16 million dollars in notes. These notes would be secured by certain mortgages held by MHDC.

Mr. Alan C. Kohn

It is proposed that the Fund be pledged as additional security for the notes to offer noteholders additional protection should the market value of the mortgages be less than their face value and insufficient to serve as adequate security for the notes. It is further anticipated that as soon as practical MHDC will obtain long-term financing for its activities.

One primary risk that MHDC takes is that any mortgage that it purchases will decline in value prior to the time long-term financing is accomplished. This is the risk that MHDC desires to insure itself against--namely a decline in value of the mortgages.

It appears that there is no express statutory fund to which this appropriation refers and the precise intent of the legislature with respect to the use of the Fund is not entirely clear. It is reasonable to conclude, however, that the legislature intended that MHDC would be in a position to meet its statutory responsibilities.

In meeting its responsibilities it is the duty of MHDC to determine the legislative intent in making the appropriation in question and to apply the appropriation accordingly. In these premises such a determination cannot be delegated to the Attorney General under the provisions of Section 27.040, RSMo, providing for the issuance of Attorney General's opinions, and we are of the view that this office should not interfere with the determination of MHDC unless such determination is clearly in error.

We have the views of MHDC and its counsel which support the application of the Fund as additional security for particular MHDC bond or note issues. We have not received the brief of any other counsel or other authority disputing the position of MHDC with respect to the use of the Fund.

Basically the view of MHDC is that because the language of the appropriation does not refer to any specific statutory fund and does not prohibit the application of the Fund to maintain the value of mortgages owned by MHDC, the Fund may be applied or used for purposes which do afford protection to the mortgages of MHDC against such specified contingencies as MHDC deems necessary. One such specified contingency is that the mortgages may decline in value prior to the time long-term financing is accomplished.

Mr. Alan C. Kohn

Although the use to which the Fund may be applied has not been defined in express terms by the General Assembly, we believe that the view of MHDC is reasonable and is within the scope of its duty to make its own determination of the use that can be made of the Fund.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH  
Attorney General

February 3, 1976

OPINION LETTER NO. 12  
Answer by letter-Verhagen

Honorable Ronald L. Boggs  
Prosecuting Attorney  
St. Charles County Courthouse  
St. Charles, Missouri 63301



Dear Mr. Boggs:

This opinion letter is in response to your questions relating to the Solid Waste Management Law, Sections 260.200 to 260.245, RSMo Supp. 1973, as amended by Senate Bill No. 98, 78th General Assembly, First Regular Session. Briefly restated, your questions are as follows:

- (1) Under the Solid Waste Management Law, may the St. Charles County Court (hereinafter referred to as County Court) require a permit or license of individuals or entities who wish to engage in the business of collecting, hauling, or disposing of solid waste in that county?
- (2) If the answer to the first question is in the affirmative, may the County Court, in addition, impose fees as an adjunct to the licensing or permit process?
- (3) May the County Court require "commercial establishments" within its jurisdiction to:
  - (a) Pay a nominal fee on an annual basis for a "solid waste permit"; and,
  - (b) Submit proof to the County Court that such establishment has a valid contract with a licensed hauler for the collection and disposal of solid waste?

Honorable Ronald L. Boggs

(4) May the County Court require each non-exempt resident of an unincorporated area within its jurisdiction to contract with a county licensed hauler for the collection and disposal of the resident's solid waste?

(5) May the County Court require each non-exempt resident of an unincorporated area within its jurisdiction to pay the county a fee for the collection of solid waste regardless of whether the resident avails himself of the collection service?

(6) May the County Court divide the unincorporated areas within its jurisdiction into "franchise areas" for purposes of granting hauling permits only to franchise holders and requiring such holders to contract with and collect solid waste from each non-exempt resident in such franchise area?

(7) If the County Court is not authorized to grant a franchise as outlined in question No. 6, may it nevertheless determine which licensed hauler will serve each unincorporated area within its jurisdiction and further require such designated hauler to contract with and collect solid waste from each non-exempt resident in such area?

(8) If the County Court may establish "franchises," must they be let on contract through open bidding pursuant to Section 50.660, RSMo 1969?

(9) May the County Court enact penalty provisions for the enforcement of its rules and regulations.

We will address your questions in the order that they have been posed.

Your first and second questions are interrelated and ask whether a county court may require those engaged in the business of solid waste collection and disposal to obtain a license or permit and, in addition, pay a fee as a prerequisite to obtaining such license or permit.

Honorable Ronald L. Boggs

The Missouri Solid Waste Management Law as contained in Sections 260.200 to 260.245, constitutes a clear expression of legislative intent to implement a state-wide solid waste management plan in cooperation with local governments, for the coordination and control of solid waste storage, collection, processing, transportation, and disposal. As this office has previously noted, ". . . the [Solid Waste Management] law was intended to eliminate the practice of numerous individuals of using unorthodox and unsightly as well as unsanitary means of disposal of refuse. . . ." Opinion Letter No. 312, 1974.

To facilitate the goal of a state-wide "solid waste management system," the legislature has provided in Section 260.215.1, that:

" . . . each county . . . shall provide . . . for the collection and disposal of solid wastes within its boundaries; shall be responsible for implementing their approved plan required by section 260.220 as it relates to the storage, collection, transportation, processing, and disposal of their solid wastes; and may purchase all necessary equipment, acquire all necessary land, build any necessary buildings, incinerators, transfer stations, or other structures, lease or otherwise acquire the right to use land or equipment. Each city and county, may levy and collect charges for the necessary cost of providing such services, and may levy an annual tax . . . for public health purposes to implement a plan for solid waste management, and to do all other things necessary to provide for a proper and effective solid waste management system; . . ." (Emphasis supplied)

Subsection 2 of this section goes on to provide that:

"Any city or county may adopt ordinances, rules, regulations, or standards for the storage, collection, transportation, processing or disposal of solid wastes which shall be in conformity with the rules and regulations adopted by the department for solid waste management systems. However, nothing in sections 260.200 to 260.245 shall usurp the legal right of a city or county from adopting and enforcing local ordinances, rules, regulations, or standards for

Honorable Ronald L. Boggs

the storage, collection, transportation, processing, or disposal of solid wastes equal to or more stringent than the rules or regulations adopted by the department pursuant to sections 260.200 to 260.245." (Emphasis supplied)

And, the legislature further provided in subsection 3(a) of this section that:

"Cities or counties may contract as provided in chapter 70, RSMo, with any person, . . . to carry out their responsibilities for the storage, collection, transportation, processing, or disposal of solid wastes." (Emphasis supplied)

We are cognizant of the many Missouri cases which hold that counties may only exercise those powers expressly granted to them by statute or necessarily implied as incident to powers expressly granted. However, it is plausible that the power and authority granted county courts by the extremely broad language of Section 260.215 does give the power to county courts to require that a license or permit be granted to individuals or entities who wish to engage in the business of collecting, hauling, or disposing of solid waste in such counties. The broad language in such section authorizes the county to do all things necessary to provide for proper and effective solid waste management system; and, as stated above, it is arguable that there is necessarily implied, as incident to such power and authority, the power and authority to require that a license or permit be granted to those who wish to engage in the business of collecting, hauling, or disposing of solid waste in such counties.

We do not, however, believe that there is necessarily implied from such broad, general authority any right or authority by the county governing body to require the payment of a fee for such a permit or license as it is our view that such authority must be found in the statute.

We are enclosing Opinion No. 337 rendered December 22, 1971, to Charles H. Sloan, which holds that counties cannot collect fees from individuals except pursuant to statutory authority.

We believe that the reasoning above set out is also applicable to questions No. 3 and 4 of your request, and it is our view that it is plausible that a county governing body can require a "commercial establishment" to submit proof to the county court that the establishment has a valid contract with a licensed hauler



Honorable Ronald L. Boggs

for the collection or disposal of solid waste and to require each nonexempt resident of an unincorporated area within its jurisdiction to contract with a county-licensed hauler for the collection and disposal of a resident's solid waste on the ground that such power is implied as incidental to the general power given in Section 260.215 providing that the county court can do all things necessary to provide for a proper and effective solid waste management system.

However, as also pointed out above, it is our view that the county court has no authority to require the payment of a fee for a "solid waste permit" but is limited to issuance of licenses or permits.

We believe that it would be improper for us to make any holding as to question No. 5 because the issue raised by such question is now pending before the Missouri Supreme Court and the Supreme Court will necessarily pass on this issue in its opinion. The case in which this issue has been raised is the case of Craig et al. v. City of Macon, et al., Cause No. 59281.

Insofar as questions No. 6 and 7 are concerned, it is our view that it is arguable that the county governing body may provide that an exclusive license may be granted to one or more persons or other entities in certain areas in unincorporated parts of the county and require such haulers to contract with and collect solid waste from each nonexempt resident in the area in which the entity is licensed. We cannot with certainty hold that the county court cannot determine which licensed hauler or haulers will serve the various areas in the unincorporated part of the county and require such hauler or haulers to contract with and collect solid waste from each nonexempt resident in such area based on the ground that such power and authority is implied as incidental to the broad, general power and authority granted by Section 260.215.

As to question No. 8, it is our view that Section 50.660, RSMo, is applicable and requires that contracts shall be awarded to the lowest and best bidder after due opportunity for competition if the contract imposes a financial obligation upon a county within the limits found in Section 50.660. If the agreement entails no financial obligation being incurred by the county, then such section would be inapplicable and no bidding requirements would be applicable.

Your last question asks whether the county court may enact penalty provisions for the enforcement of its rules and regulations. Section 260.240(2) provides as follows:

Honorable Ronald L. Boggs

"Any rule, regulation, standard or order of a county court, adopted pursuant to the provisions of sections 260.200 to 260.245, may be enforced in a civil action for mandatory or prohibitory injunctive relief or for the assessment of a penalty not to exceed one hundred dollars per day for each day, or part thereof, that a violation of such rule, regulation, standard or order of a county court occurred and continues to occur, or both, as the court deems proper. The county court may request the prosecuting attorney or other attorney to bring any action authorized in this section in the name of the people of the state of Missouri."

It is our view that such section manifests a legislative intent to establish the only penalty for any persons or entities violating the rules or regulations promulgated by a county and, as such, provides the penalty for a violation of the valid rules and regulations adopted by the county.

We are aware of the opinion of the Supreme Court in the case of State v. Raccagno, No. 58843 (Mo. December 24, 1975). However, it is doubtful that such opinion means that all statutes purporting to provide criminal penalties or other penalties for violations of the rules and regulations of a governmental entity are invalid. It is our view that the determination must be made in each case as to whether or not sufficient guidelines have been set out in the statutory provisions authorizing the rules and regulations as a guide for the body issuing such rules and regulations so that the penalty provisions found in the statute are effective to provide punishment for violations of such rules and regulations.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op.No. 337  
12-22-71, Sloan



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

January 28, 1976

OPINION LETTER NO. 14

Honorable Jim Arnold  
Representative, District 131  
c/o House Post Office, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Arnold:

This letter is issued in response to your questions regarding the construction of Section 564.439 (S.B. 32, 78th General Assembly) effective September 28, 1975, and the relation of this statute to Section 564.440, RSMo 1969.

The questions posed in your opinion request letter dated November 14, 1975, as modified by telephone conversation on December 9, 1975, are as follows:

"a. Is the maximum punishment for the third offense of driving with a blood-alcohol content of .10 percent or more a misdemeanor or a felony?

"b. If the second or third offense of driving with a blood-alcohol content of .10 percent or more is not within a period of three years, is this offense again considered a first offense?

"c. Would a person arrested and convicted for the third offense of driving while intoxicated prior to September 28, 1975, but sentenced after this date, be entitled to the more liberal punishment of Section 564.439, RSMo?

Honorable Jim Arnold

- "d. Does enactment of Section 564.439, RSMo, in effect, repeal Section 564.440, RSMo?"

Your first question:

"a. Is the maximum punishment for the third offense of driving with a blood-alcohol content of .10 percent or more a misdemeanor or a felony?"

Section 564.439-2 provides in part:

"Any person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished as follows:

\* \* \*

(3) For the third and subsequent offenses within a period of three years, by confinement in the county jail for a term of not less than forty-five days and not more than one year." (Emphasis supplied)

Additionally, Section 556.040, RSMo 1969, provides that offenses punishable by imprisonment in the county jail shall be deemed misdemeanors. It is, therefore, the opinion of this office that the third offense of driving with a blood-alcohol content of .10 percent or more is a misdemeanor.

Your second question is:

"b. If the second or third offense of driving with a blood-alcohol content of .10 percent or more is not within a period of three years, is this offense again considered a first offense?"

Section 564.439-2 states:

"Any person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished as follows:

(1) For the first offense, by a fine of not less than fifty dollars or by confinement in the county jail for a term of not

Honorable Jim Arnold

- more than three months, or by both such fine and confinement;

(2) For the second offense within a period of three years, by confinement in the county jail for a term of not less than seven days and not more than six months;

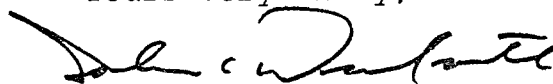
(3) For the third and subsequent offenses within a period of three years, by confinement in the county jail for a term of not less than forty-five days and not more than one year."

The meaning of a statute is determined by the legislative intent, taking the words used in their plain and ordinary meaning. State ex rel. Dravo Corporation v. Spradling, 515 S.W.2d 512 (Mo. 1974). The varying penalties prescribed by Section 564.439-2 evidence a legislative intent to punish the multiple violations thereof more severely in connection with the frequency of such violations within a three-year period. The words of the statute, given their plain and ordinary meaning, indicate the following:

The statute provides that the increased punishment for a second offense is applicable only when it is committed within a period of three years from the first offense. Thus, it is the opinion of this office that a second offense committed outside the three-year period will be punishable as a first offense. The statute further provides that the increased punishment for a third offense is applicable only when it is committed within three years from the first offense. It is, therefore, the opinion of this office that a third offense committed outside that period would be punishable as a first offense, unless it is within a three-year period from the offense immediately preceding it, in which case it is punishable as a second offense.

A case is now pending in the Supreme Court of Missouri in which the contention is made that the enactment of Section 564.439 repealed Section 564.440 on the date Section 564.439 became effective. It has long been the practice of this office to decline to render an opinion on a question which is pending in a case that is being litigated in court and which question must be decided by the court. We must, therefore, decline to issue an opinion covering your third and fourth questions.

Yours very truly,

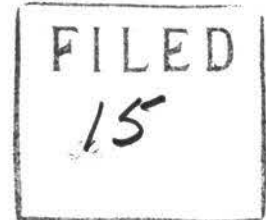


JOHN C. DANFORTH  
Attorney General

February 23, 1976

OPINION LETTER NO. 15  
Answer by letter-Mansur

Honorable Frank Bild  
State Senator, 15th District  
c/o Senate Post Office  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Bild:

This is in response to your request for an opinion from this office as follows:

"Are court reporters in any way affected by the 'Sunshine Law' insofar as it might pertain to court reporters and the expunging of records?

"Clarification is needed on whether court reporters are in any way affected by the Sunshine Law in the instance of where a defendant is acquitted of manslaughter and a transcript is ordered by an insurance company without the permission of the defendant, or in a criminal case where pre-trial motions to suppress, etc. are ordered and delivered to counsel, and subsequently the case is nolle prossed or the defendant is acquitted and the transcript used in a companion case."

The question you have submitted involves the interpretation only of Section 610.105, RSMo Supp. 1973, concerning records in criminal cases.

Section 610.105, RSMo Supp. 1973, provides as follows:

"If the person arrested is charged but the case is subsequently nolle prossed, dismissed

Honorable Frank Bild

or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged."

You specifically inquire whether the court reporter is prohibited from furnishing a transcript of the evidence to a third person without the permission of the defendant in a criminal case after he has been acquitted or when the case is nolle prossed.

Section 610.105 provides that if a person arrested is found not guilty in the court in which the action is prosecuted, the official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged. The question you submit is whether the record made by the official court reporter comes within the provision of this statute as an official record.

Section 485.040, RSMo, provides for the judges of the circuit court to appoint an official court reporter for the court who shall be well skilled in the art of shorthand reporting and who shall be a sworn officer of the court. Other statutory provisions require the court reporter to record certain matters in criminal proceedings. It is our opinion that the record kept by the official court reporter in a criminal case comes within the provisions of Section 610.105 as an official record pertaining to the case and thereafter shall be closed records to all persons except the person arrested or charged and acquitted.

Section 485.050, RSMo, which defines the duties of the official court reporter, provides that he shall preserve all official notes taken in said court for future use or reference and to furnish to any person or persons the transcript of all or any part of the evidence or oral proceedings upon the payment to him of the fee herein provided.

The above-statutory provision applies to both civil and criminal matters pending before the court. It is a general statute applying to both civil and criminal matters and has been in effect many years. Section 610.105 was first enacted in 1973 and applies only to criminal proceedings and appears to be in conflict with the provisions of Section 485.050.

It is the cardinal rule of statutory construction that where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together



Honorable Frank Bild

and harmonized if possible, with the view to giving effect to a consistent legislative policy, but, to the extent of any necessary repugnancy between them, the special law will prevail over the general statute and, where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general statute. Laughlin v. Forgrave, 432 S.W.2d 308 (Mo.Banc 1968).

It is our opinion that the provisions of Section 610.105 prevails over the provisions of Section 485.050 and that the court reporter is prohibited from furnishing a transcript of the proceedings to any person other than the defendant in a criminal case if such defendant is acquitted or the case is nolle prossed.

You also inquire as to whether the Sunshine Law affects a court reporter who furnishes to an attorney copies of motions to suppress or other documents filed in a criminal case before the case is nolle prossed or the defendant is acquitted. It is our view that the court reporter or anyone else can make copies of documents filed in a court case and deliver such documents to an attorney prior to the case's being nolle prossed or the acquittal of the defendant and that such action does not violate the Sunshine Law. However, the Sunshine Law prohibits the reporter from furnishing such documents to an attorney or anyone else except the defendant after the case is nolle prossed or the defendant is acquitted.

Yours very truly,

JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
JEFFERSON CITY

January 23, 1976

OPINION LETTER NO. 16

Honorable Wesley A. Miller  
Representative, District 121  
c/o House Post Office, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Miller:

This is in response to your request for an opinion from this office as follows:

"Does Section 88.814 R.S.Mo. 1969 as amended by House Bill No. 220, passed and approved July 18, 1975, permit a municipality to pay a portion of the cost of a district sewer when Section 88.842 R.S.Mo. 1969 strictly prohibits such a payment; and if so, does House Bill No. 220 apply retroactive so as to permit a municipality to reimburse individuals for a portion of a special tax bill issued in 1971 as payment for the construction of a district sewer where said individuals have paid the special tax bills in full."

Washington is a third class city.

You first inquire whether House Bill No. 220, passed and approved July 18, 1975, by the 78th General Assembly, permits a municipality to pay a portion of the cost of a district sewer when Section 88.842, RSMo 1969, strictly prohibits such payment.

Section 88.814 of House Bill No. 220, provides in part:

"In all cases where work is done or improvements made and the cost thereof is assessed as a special tax, any owner of property upon

Honorable Wesley A. Miller

which such tax is levied may request, and the legislative body of such city, town, or village shall grant, a public hearing to determine whether such assessment is excessive or is levied at a greater sum than was stated in the notices required by section 88.812, RSMo. The legislative body is hereby empowered to adjust or reduce such assessment which is determined to be excessive or levied at a greater sum than was stated in the notices. If such adjustments or reductions result in the collection of special taxes insufficient to pay the costs of work done or improvements made, the city, town, or village, may pay the difference between costs accrued and special taxes collected out of general revenue."

This bill applies in all third and fourth class cities, special charter cities and towns and villages.

Section 88.832, RSMo 1969, provides that any municipality of certain classification shall have power to cause a general sewer system to be established, which shall be composed of four classes of sewers, to-wit, public, district, joint district, and private sewer. It further provides for the establishment of public sewers as provided therein.

Section 88.834, RSMo 1969, provides for district sewers to be established; and Section 88.836, RSMo 1969, provides for the apportionment of the cost of the district sewer and levy of tax.

Section 88.838, RSMo 1969, provides for the establishment of joint sewer districts and for the costs of construction.

Section 88.842, to which you refer, provides in part as follows:

"1. Private sewers connected with the public, district or joint district sewers may be constructed under such restrictions and regulations as the governing body of the municipality may prescribe by general ordinance; but the municipality shall be at no expense in the construction, repairing or cleaning of the same, or for any damage that may arise from their construction.

"2. The municipality shall incur no liability for building district or joint district

Honorable Wesley A. Miller

sewers other than in the manner provided in section 88.838, except when the city, town or village is the owner of a lot of ground within the district or joint sewer district, and in such case the said municipality shall be liable for the cost of said sewer in the same manner as other property owners within the district. The repair, cleaning and other incidental expenses of district and joint district sewers shall be paid out of the general appropriation for that purpose." (Emphasis supplied)

The question is whether House Bill No. 220 permits a municipality to pay a portion of the cost for building a district sewer in view of the provisions of Section 88.842.

It is our view that Section 88.842 is a special statute limited to sewers as provided therein and that House Bill No. 220 is a general statute which has to do with public improvements in general including construction of sidewalks, sewers, paving, curbing, and guttering of any street and any other improvements as authorized by statute. House Bill No. 220 expressly repeals Sections 88.812 and 88.814, RSMo 1969. Section 88.812 prior to its repeal included in general the same language regarding constructing and repairing sidewalks, curbing, sewer, and other public improvements. Section 88.842 was enacted at the same time that Section 88.812 was originally enacted and such sections are considered of equal importance. House Bill No. 220 does not expressly repeal Section 88.842, and the question is whether it is in conflict with or impliedly repeals the provision of Section 88.842. It is our view that it does not and that provisions of Section 88.842 govern.

As heretofore stated, House Bill No. 220 is a statute that includes the establishing and maintenance of public works in general by a municipality. Section 88.842 is a special statute applying only to establishing certain sewers in a municipality. Where special and general statutes treat of same subject matter but are not irreconcilably inconsistent, a general statute, though later in date, will not be held to have repealed a special statute, and a special statute will prevail in its application to subject matter as far as it comes within special provisions. Gross v. Merchants-Produce Bank, 390 S.W.2d 591 (K.C.Mo.App. 1965).

Since Section 88.814 of House Bill No. 220 is a general statute and Section 88.842 is a special statute applying only to certain types of sewers, it is our opinion that Section 88.842 is still in effect and must be followed in establishing sewers as provided therein.

Honorable Wesley A. Miller

In view of this interpretation of House Bill No. 220, the latter questions you submit are moot.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

August 20, 1976

OPINION LETTER NO. 17

Mr. J. Neil Nielsen, Commissioner  
Office of Administration  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Nielsen:

This is in reply to your request for an opinion on the following question:

Section 33.103, RSMo Supp. 1975, provides that the Commissioner of Administration may deduct from an employee's compensation warrants for participation in a voluntary retirement plan. Such deductions are currently made for tax-sheltered annuity program participants employed by the Departments of Higher Education, Elementary and Secondary Education, and Mental Health. The total amount deducted is then paid to the authorized agent who pays the various vendors of the annuity contract which have been chosen by the individual employees. Does S.C.S.H.C.S. House Bill No. 1112, Second Regular Session, 77th General Assembly, require a competitive bidding process for selection of one vendor of these tax-sheltered annuity contracts authorized by Section 33.103?

Section 33.103, RSMo Supp. 1975, reads in part as follows:

"1. Whenever the employees of any state department, division or agency establish any voluntary retirement plan, or participate in any group hospital service plan, group life insurance plan, medical service plan or other such plan, the commissioner

Mr. J. Neil Nielsen

of administration may deduct from such employees' compensation warrants the amount necessary for each employee's participation in the plan. Before such deductions are made, the person in charge of the department, division or agency, shall file with the commissioner of administration an authorization showing the names of participating employees, the amount to be deducted from each such employee's compensation, and the agent authorized to receive the deducted amounts. The amount deducted shall be paid to the authorized agent in the amount of the total deductions by a warrant issued as provided by law."

Because tax-sheltered annuity plans are one type of "voluntary retirement plan," deductions may be made from employees' compensation warrants, and the amounts so deducted paid to the "authorized agent," if the department, division, or agency has filed with the Commissioner the name of the authorized agent, the names of the participating employees, and the amounts to be deducted.

The primary rule of statutory construction is to determine and to give effect to the intent of the legislature, as determined from the plain and ordinary meaning of the words used. State ex rel. Dravo Corporation v. Spradling, 515 S.W.2d 512 (Mo. 1974). Since the language used in Section 33.103 is plain and unambiguous, statutory construction is unnecessary. United Airlines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo. Banc 1964). We find no requirement in Section 33.103 for competitive bidding.

Section 105.915(2), RSMo Supp. 1975, provides that annuities offered pursuant to the Missouri deferred compensation plan shall be selected by a competitive bidding process. Since competitive bidding is required only for selection of annuities to be offered pursuant to the Missouri deferred compensation plan, the competitive bidding requirement does not apply to voluntary retirement plans instituted pursuant to Section 33.103. The deferred compensation statute, Sections 105.900-105.925, does not directly repeal Section 33.103. Repeals by implication are not favored in the law. Kansas City Terminal Railway Company v. Industrial Commission, 396 S.W.2d 678 (Mo. 1965).

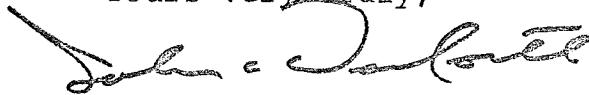
Our opinion that Section 105.915(2) does not require a competitive bidding process for selection of one vendor of tax-sheltered annuity contracts purchased pursuant to a Section 33.103 voluntary retirement plan is further supported by the fact that the vested contract rights of certain voluntary retirement plan participants

Mr. J. Neil Nielsen

could be adversely affected by requiring those participants to terminate their current annuity contracts and to purchase new annuity contracts from one vendor.

Therefore, it is our view that Section 105.915(2) does not require a competitive bidding process for selection of one vendor of tax-sheltered annuity contracts purchased pursuant to a voluntary retirement plan authorized by Section 33.103.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

STATE TREASURER:

The State Treasurer is authorized to invest through repurchase agreements in United States obligations payable within one year those moneys not needed for current operating expenses and that are available for less than thirty days. The obligations must be kept by the State Treasurer in the manner provided in Section 30.270(2), V.A.M.S.

*See Sec 30.260.2 & 4  
RS MO Supp 1984*

OPINION NO. 19

April 5, 1976

Honorable James I. Spainhower  
State Treasurer of Missouri  
Room 229, Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Spainhower:

This opinion is issued in response to your question which reads as follows:

"Can the State Treasurer, according to present constitutional and statutory provisions, invest state moneys in United States Government Obligations under a repurchase agreement?"

Article IV, Section 15 of the Missouri Constitution, defines the duties of the State Treasurer, which include the following:

". . . The state treasurer shall determine by the exercise of his best judgment the amount of state moneys that are not needed for current operating expenses of the state government and shall place all such moneys not needed for payment of the current operating expenses of the state government on time deposit, bearing interest, in banking institutions in this state selected by the state treasurer and approved by the governor and state auditor or in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable



Honorable James I. Spainhower

not more than one year from the date of purchase. The investment and deposit of such funds shall be subject to such restrictions and requirements as may be prescribed by law. . . ."

Pursuant to the authority granted in Article IV, Section 15 of the Missouri Constitution, the General Assembly has enacted two provisions relating to the investment of state moneys in United States obligations. Section 30.260(2), V.A.M.S., provides as follows:

"The state treasurer shall place the state moneys which he has determined are not needed for current operations of the state government on time deposit drawing interest in banking institutions in this state selected by him and approved by the governor and the state auditor, or place them in short term United States government obligations maturing and becoming payable one year or less from the date of issue, or in other United States obligations maturing and becoming payable not more than one year from the date of purchase, as he in the exercise of his best judgment determines to be in the best overall interest of the people of the state of Missouri, giving due consideration to (1) the preservation of such state moneys, (2) the comparative yield to be derived therefrom, (3) the effect upon the economy and welfare of the people of Missouri of the removal or withholding from banking institutions in the state of all or some such state moneys and investing same in obligations of the United States government, and (4) all other factors which to him as a prudent state treasurer seem to be relevant to the general public welfare in the light of the circumstances at the time prevailing."

Section 30.260(4), V.A.M.S., provides as follows:

"The state treasurer may subscribe for or purchase obligations of the United States government of the character described in subsection 2 of this section which he, in the exercise of his best judgment, believes to be the best for investment of state moneys

Honorable James I. Spainhower

at the time and which are available to him at a price not in excess of par plus interest accrued to the date of purchase, and in payment therefor may withdraw moneys from any bank account, demand or time, maintained by him without having any supporting warrant of the comptroller. The state treasurer may bid on subscriptions for such obligations in accordance with his best judgment. The state treasurer shall provide for the safekeeping of all such obligations so acquired in the same manner that securities pledged to secure the repayment of state moneys deposited in banking institutions are kept by him pursuant to law. The state treasurer may hold any such obligation so acquired by him until its maturity or prior thereto may sell the same as he, in the exercise of his best judgment, deems necessary or advisable for the best interest of the people of the state of Missouri in the light of the circumstances at the time prevailing. The state treasurer may pay all costs and expenses reasonably incurred by him in connection with the subscription, purchase, sale, collection, safekeeping or delivery of all such obligations at any time acquired by him."

The Missouri Constitution and statutes expressly authorize the State Treasurer to invest state moneys that are not needed for current operating expenses in United States obligations. To determine whether the State Treasurer may make such investments under a "repurchase agreement" requires discussion of the nature of such an arrangement.

According to the materials you have provided this office, a repurchase agreement involves the sale of securities with the agreement that after a stated period of time the original seller will buy back the same securities at a pre-determined price or yield. The interest rate on repurchase agreements is a matter of negotiation between the seller of the securities and the investor. The advantage to be derived by the investor through use of repurchase agreements is the ability to invest funds that are available for only a short period of time with an assured return on the investment and the avoidance of a capital loss. As you have noted in your opinion request:

Honorable James I. Spainhower

"Banks are prohibited by Federal regulations from paying interest on deposits of less than 30 days, thus eliminating bank deposits as a source of short-term investments. In addition, United States Government Obligations of the one-two week maturity range are almost impossible to acquire, although occasionally the securities can be purchased at a reduced yield to the investor.

"The purchase of longer-term Government Obligations and subsequent immediate resale can often result in a reduction in yield and possibly a loss of principle [sic] if interest rates increase dramatically. Hence, the Treasurer feels that the authority to engage in repurchase agreements involving United States Government Obligations would offer a new dimension as well as give added flexibility to the investment of short-term state moneys. This instrument would allow the Treasurer to invest prudently for short periods of time without the risk of losing interest or principal due to market fluctuations."

Based on the foregoing, we shall assume for the purpose of this opinion that you are asking about the legality of investing in repurchase agreements only those moneys not needed for current operating expenses that are available for less than thirty days.

Sections 30.260 (2) and 30.260 (4), V.A.M.S., authorize the State Treasurer to purchase "short term United States government obligations maturing and becoming payable one year or less from the date of issue, or in other United States obligations maturing and becoming payable not more than one year from the date of purchase." Section 30.260 (4), V.A.M.S., also permits the State Treasurer to hold such obligations until they mature or to sell them prior to maturity in the exercise of his best judgment. Although neither section expressly provides for investment in United States obligations by means of repurchase agreements, we find no basis for distinguishing a purchase and sale effected by means of a repurchase agreement from the more conventional transaction, provided the obligations are payable within one year.

The overriding emphasis of Section 30.260, V.A.M.S., is to confer upon the State Treasurer broad discretion to invest state

Honorable James I. Spainhower

moneys not needed for current operations profitably but prudently in time deposits or United States obligations. (See Opinion No. 64 (Morris), May 2, 1957, a copy of which is enclosed.) In exercising his judgment, the State Treasurer is required to consider the preservation of state moneys, the comparative yield to be derived, the effect upon the economy and welfare of the people of Missouri of removing or withholding state moneys from Missouri banking institutions, and all other factors relevant to the public welfare in the light of the circumstances prevailing at the time. Section 30.260(2), V.A.M.S.

Investment in United States obligations carries no greater risk of loss when the investment is effectuated by means of a repurchase agreement. To the contrary, under a repurchase agreement the risk of loss is less than it would be if the purchase and sale were made in the conventional manner, for the rate of return to the investor is negotiated and fixed in advance of the transaction and is not affected by market fluctuations. Furthermore, investment in United States obligations through repurchase agreements could provide a greater yield on state moneys than would otherwise be possible when funds not needed for current operating expenses are available for less than thirty days.

Finally, the effect upon the economy and welfare of the people of Missouri occasioned by removing or withholding state moneys from banks located within the state would be no different whether United States obligations are purchased in the conventional manner or by means of a repurchase agreement. In either case the alternatives are interest-bearing time deposits versus United States obligations, and the State Treasurer must allocate between these investments in the exercise of his best judgment on the basis of prevailing circumstances.

When the State Treasurer invests in United States obligations, Section 30.260(4), V.A.M.S., requires that he "provide for the safekeeping of all such obligations so acquired in the same manner that securities pledged to secure the repayment of state moneys deposited in banking institutions are kept by him pursuant to law." According to the information you have furnished this office, the actual bill, note or certificate of indebtedness is seldom delivered to the investor under a repurchase agreement. His purchase from and resale to the dealer is evidenced instead by debits and credits in the dealer's books or those of the Federal Reserve Bank.

In Opinion Letter No. 258 (Robinson), issued October 2, 1972, a copy of which is enclosed, we concluded that "book-entry treasury

Honorable James I. Spainhower

securities" were simply another method of evidencing a United States government obligation and that subsections 2 and 4 of Section 30.260, V.A.M.S., do not require the Treasurer to seek the actual document reflecting the obligation of the United States. It is the opinion of this office that the same conclusion obtains with respect to investment in United States obligations pursuant to repurchase agreements with the same qualification, namely, that the obligations be kept by the State Treasurer in the same manner that collateral pledged by state depositories are kept pursuant to Section 30.270(2), V.A.M.S., e.g., either the government obligations may be held by a bank other than the dealer-bank chosen in the manner provided in Section 30.270(2), V.A.M.S., or the purchase may be reflected by a credit to the account of the State Treasurer in the books of the Federal Reserve Bank which holds the securities in which the dealer deals.

#### CONCLUSION

By reason of the foregoing, it is the opinion of this office that the State Treasurer is authorized to invest through repurchase agreements in United States obligations payable within one year those moneys not needed for current operating expenses and that are available for less than thirty days. The obligations must be kept by the State Treasurer in the manner provided in Section 30.270(2), V.A.M.S.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen M. Iverson.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 64  
5-2-57, Morris

Op. Ltr. No. 258  
10-2-72, Robinson



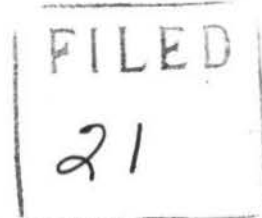
STATE AUDITOR:  
CONSTITUTIONAL LAW:  
KANSAS CITY PHILHARMONIC ORCHESTRA:

The State Auditor is not  
authorized to audit the  
Kansas City Philharmonic  
Association.

OPINION NO. 21

January 19, 1976

Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This opinion is in response to your request as follows:

"Do I, as State Auditor, have the authority to audit the Kansas City Philharmonic Orchestra?"

The Kansas City Philharmonic Orchestra Association ("Philharmonic") is a not-for-profit corporation duly organized and registered under the laws of Missouri. You have informed us that the General Assembly has appropriated funds to the Missouri State Council on the Arts which, in turn, has granted an amount in excess of \$300,000 to the Philharmonic for fiscal year 1975.

Article IV, Section 13 of the Missouri Constitution states:

"The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds."

Honorable George W. Lehr

Section 29.200, RSMo 1969, states:

"The state auditor shall postaudit the accounts of all state agencies and audit the treasury at least once annually. Once every two years, and when he deems it necessary, proper or expedient, the state auditor shall examine and postaudit the accounts of all appointive officers of the state and of institutions supported in whole or in part by the state. He shall audit any executive department or agency of the state upon the request of the governor."

Section 29.230, RSMo 1969, states:

"1. In every county which does not elect a county auditor, the state auditor shall audit, without cost to the county, at least once during the term for which any county officer is chosen, the accounts of the various county officers supported in whole or in part by public moneys. The audit shall be made as near the expiration of the term of office as the auditing force of the state auditor will permit.

"2. The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five percent of the qualified voters of the political subdivision determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

In addition to the Constitution, these two statutory provisions contain the basic authority for the State Auditor to audit state and local government. Nowhere in these provisions, or in Chapter 29 generally, is the State Auditor authorized to audit the accounts of a private not-for-profit corporation.

Honorable George W. Lehr

As expressed in 67 C.J.S., Officers, Section 102, p. 365 (1950):

"Public officers have only such power and authority as are clearly conferred by law or necessarily implied from the powers granted, . . .

\* \* \*

". . . no powers will be implied other than those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred and imposed, . . ." (l.c. 366, 369)

Considering these principles, in light of your request, we can find no authority for the proposed audit of the Kansas City Philharmonic Association. Therefore, we are compelled to conclude you are not authorized to conduct such audit.

#### CONCLUSION

It is the opinion of this office that the State Auditor is not authorized to audit the Kansas City Philharmonic Association.

The foregoing opinion, which I do hereby approve, was prepared by my assistant, Andrew Rothschild.

Very truly yours,



JOHN C. DANFORTH  
Attorney General





OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

October 26, 1976

OPINION LETTER NO. 22

Mr. Michael D. Garrett, Director  
Department of Public Safety  
P. O. Box 749  
Jefferson City, Missouri 65101

Dear Mr. Garrett:

This is in response to your request for an opinion of this office on the following questions:

"a. Whether members of the Missouri National Guard may be tried by courts-martial, authorized by Chapter 41, Revised Statutes of Missouri, for offense(s) committed while performing duty described in Sections 316, 501 through 505, Title 32, United States Code, in light of Sections 17, 18(a) and 24, Article I, Missouri Constitution?

"b. Whether Commanders of the Missouri National Guard may administer non-judicial punishment for minor offense, under the authority of Part IV, Regulation for the administration of Military Justice for the State of Missouri, signed by the Governor on 12 December 1972, in the absence of statutory authority?"

The circumstances under which a member of the Missouri National Guard may be subject to trial by court-martial under state law are not clearly set forth in either the Constitution of Missouri or Missouri statutes. However, as your first question has noted, there are constitutional provisions which address themselves to the matter you have raised. The most significant provision in the Constitution of Missouri affecting state courts-martial is Article I, Section 17, which provides as follows:

Mr. Michael D. Garrett

"That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be applied to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor to prevent arrests and preliminary examination in any criminal case."  
(Emphasis added)

This section of the Missouri Constitution is nearly the same as the Fifth Amendment to the United States Constitution. The excepting clause in Article I, Section 17, Constitution of Missouri, is identical to the language in the Fifth Amendment to the United States Constitution.

Further, constitutional provisions of this state affecting jurisdiction of courts-martial include Article I, Section 24, Constitution of Missouri, which provides in part that:

"That the military shall be always in strict subordination to the civil power; . . ."

In addition, Article III, Section 46, requires that:

"The general assembly shall provide for the organization, equipment, regulations and functions of an adequate militia, and shall conform the same as nearly as practicable to the regulations for the government of the armed forces of the United States."

The only case in this state dealing with the trial of a member of the Missouri National Guard under state law is McKittrick v. Brown, 85 S.W.2d 385 (Mo.Banc 1935). It should be noted that although that case dealt with the application of the Constitution of Missouri 1875 (in effect in 1935), the sections of the 1945 Constitution, noted above, were the same in the Constitution of 1875. In McKittrick v. Brown, the court upheld the court-martial provisions of state law in a case in which a member of the Missouri National Guard was charged with second degree murder during his participation in state active duty, pursuant to a valid call by the Governor during a time of "public danger." The court held that the excepting language in Article I, Section 17, of the present Missouri Constitution (Article II, Section 12, Constitution of Missouri 1875) authorized state trial by court-martial under applicable state statutes. Even in view of the subordination of

Mr. Michael D. Garrett

military to civil power under Article I, Section 24, of the present Constitution (Article II, Section 27, Constitution of Missouri 1875), the court held that:

" . . . In other words, we hold that section 27, art. 2, of the Constitution, and the aforesaid sections thereof guaranteeing an accused the right of jury trial in the civil courts, interpose no constitutional obstacle to the enactment of state statutes authorizing the trial of persons in the military service for felony or misdemeanor by court-martial, in cases arising in the militia when in actual service in time of public danger--found and declared by the Governor--especially where such statutes conform to the regulations for the government of the Armies of the United States. . . ." Id.  
at 388

The state statutes enacted to provide for trial by court-martial of members of the militia have not been changed in any significant degree since McKittrick v. Brown, supra. The powers and procedure for court-martial under Missouri law are set forth in Section 41.590, RSMo 1969, and provide as follows:

"The military courts of this state shall be general courts-martial, special courts-martial and summary courts-martial, such as are now provided or may be hereafter provided by the laws and regulations covering the armed forces of the United States and shall be constituted and have cognizance of the same subjects and possess like powers as similar courts provided by the laws and regulations governing the armed forces of the United States, and, as far as practicable, follow the forms and modes of procedure prescribed for said similar courts; except that the word 'governor' shall be substituted for the word 'President' whenever the same shall appear in such laws and regulations. The prosecution in a general, special or summary court-martial of the militia of this state shall be in the name of the state. The governor, upon advice of the military council, shall promulgate or publish regulations covering military courts, as herein

Mr. Michael D. Garrett

provided, not inconsistent with the constitution of this state and this chapter."

Section 41.590 seems to incorporate the subject matter jurisdiction of applicable federal law governing military courts-martial, i.e., the Uniform Code of Military Justice, 32 U.S.C. §§ 801-935. Sections 41.600-41.620, RSMo 1969, set forth the powers of general, special, and summary courts-martial in this state.

This assimilation of federal military law appears permissible since McKittrick v. Brown, supra, involved the trial of a member of the Missouri National Guard under existing Articles of War enacted by Congress.

In light of the above-noted authority, can it be said that state court-martial jurisdiction extends to duty described in 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505? For reasons noted hereafter, it is our opinion that a distinction must be made between summary court-martial jurisdiction and jurisdiction for special and general courts-martial. First we will discuss state jurisdiction for special and general courts-martial.

It is most significant to note the type of military duty provided by those sections of federal law noted in your first question. 32 U.S.C. § 316 deals with the detailing by the President of national guardsmen ". . . to duty as instructors at rifle ranges for the training of civilians in the use of military arms." 32 U.S.C. §§ 501-505 requires training by the National Guard in the form of drills, field exercises, and military schools.

Clearly, duty pursuant to 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 is not "state active duty" within the provisions of Sections 41.480-41.500, RSMo 1969, which provide for the calling out of the militia and reserve forces to:

". . . execute the laws, suppress . . . insurrection . . . repeal invasion. . . .

". . . provide emergency relief to a distressed area in the event of earthquake, flood, tornado or other actual or threatened public catastrophe creating conditions of distress or hazard to public health and safety beyond the capacities of local or other established agencies."

In addition, it should be noted that compensation for duty described in 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 would properly be paid by the federal government under Title 32 U.S.C. since

Mr. Michael D. Garrett

the state pays members of the Missouri National Guard only for "active duty in the service of the state." Section 41.430, RSMo 1969. Accordingly, it cannot be said that training under 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 constitutes duty which excepts the constitutional requirement of criminal prosecution by information or indictment under Article I, Section 17, Constitution of Missouri, since such duty is not "actual service in time of war or public danger."

This question has been litigated on rare occasions by other states. In State ex rel. Sage v. Montoya, 338 P.2d 1051 (N.M. 1959), the Supreme Court of New Mexico considered a writ of prohibition brought by members of the New Mexico National Guard to prevent trial in state court for crimes committed while said guardsmen were in active state service for administrative duty. The Constitution of New Mexico, at that time, required trial for such crimes only after indictment or filing of information except in cases arising in the militia when in active service in time of war or public danger, i.e., language identical to that in the Missouri Constitution. The court in State ex rel. Sage v. Montoya held that:

"The . . . constitutional provision is clear and unambiguous. Hence it is not subject to interpretation or construction by this court. [citation omitted]

"No war or state of public danger existed during the period in which the alleged felonious acts occurred and we will take judicial notice of this fact. [citation omitted] Such being the case, a military court would be wholly without jurisdiction to try relators for the felonies with which they are charged. Clearly then the civil courts must have jurisdiction . . ." Id. at 1053

For a similar holding, see State ex rel. Poole v. Peake, 135 N.W. 197 (N.D. 1912). See also, Note of the Joint Legislative Committee to Study the Military Law, N.Y. Military Law, Article VII (McKinney 1953).

It could be argued that a member of the Missouri National Guard could be tried by special or general courts-martial under state law while performing duty described in 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 since trial after indictment or information is not required for "cases arising in the land or naval forces"

Mr. Michael D. Garrett

as well as for cases arising "in the militia when in actual service in time of war or public danger." Article I, Section 17, Constitution of Missouri 1945.

It is our opinion, however, that the state of Missouri has no "land or naval forces" distinct from the militia. The National Guard of each state is the modern militia reserved to the state by Article I, Section 8, Clause 15, Constitution of the United States. Maryland v. United States, 381 U.S. 41, 85 S.Ct. 1293, 14 L.Ed.2d 205 (1965). Furthermore, the Constitution of Missouri 1945 provides for the organization and regulation of a "militia" and not a distinct "land or naval force." Article III, Section 46, Constitution of Missouri 1945. The only logical explanation for the inclusion of the phrase "land or naval force" in Article I, Section 17, Constitution of Missouri 1945, is that the excepting clause containing that phrase is identical to the language in the Fifth Amendment to the United States Constitution from which Article I, Section 17, Constitution of Missouri, was adopted. The excepting of "land or naval forces" in the Fifth Amendment to the United States Constitution has been interpreted to mean that members of the armed forces during periods of active duty in federal service may be tried for capital crimes without indictment or information. Even then, the jurisdiction of military courts under the Uniform Code of Military Justice has been limited. Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969).

Accordingly, we believe that Article I, Section 17, Constitution of Missouri 1945, permits criminal prosecutions in this state without information or indictment only in cases arising in the militia when on state active duty at the call of the Governor pursuant to Chapter 41, RSMo 1969. Therefore, it is only pursuant to such duty that a member of the Missouri National Guard may be trial by special or general courts-martial.

We do not mean to imply that Article I, Section 17, Constitution of Missouri, is an absolute barrier to all levels of state courts-martial. This provision of our state constitution addressed only criminal prosecutions for felonies or misdemeanors. In Middendorf v. Henry, \_\_\_\_\_ U.S. \_\_\_\_\_, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), the Supreme Court of the United States held that a summary court-martial under the Uniform Code of Military Justice is not a "criminal prosecution" in view of the nature of the proceedings and the fact that it occurs in a regimented military community. See also Parker v. Levy, 417 U.S. 733, 749, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

Mr. Michael D. Garrett

We believe the holding in Middendorf v. Henry to be equally applicable to a summary court-martial under Chapter 41, RSMo 1969. The extensive assimilation of federal military law into Chapter 41 has previously been noted by reference to Article III, Section 46, Constitution of Missouri 1945, and Section 41.590, RSMo 1969. Additionally:

"All acts of the Congress of the United States providing for the administration, control, equipment, government and organization of the armed forces of the United States, together with the rules and regulations promulgated thereunder, now in effect and hereafter enacted or promulgated, may by appropriate rules and regulations be adopted by the governor for the operation and regulation of the militia of the state insofar as the same are not inconsistent with rights reserved to this state under the constitution of the state and provisions of this code." (Section 41.020, RSMo)

"The system of discipline and training for the federally recognized components of the organized militia shall conform generally to that of the United States armed forces except as otherwise provided in this military code. The system of discipline and training for the Missouri reserve military force, when organized, shall be as prescribed by the governor." (Section 41.460, RSMo)

In light of Middendorf v. Henry and the obvious intent of our state constitution and General Assembly to conform the state military code to the Uniform Code of Military Justice (10 U.S.C. §§ 801-940), we conclude that a summary court-martial under Section 41.620, RSMo 1969, is not a criminal prosecution and thus need not be preceded by indictment or information.

There is, however, a practical barrier to the use of trial by summary court-martial under Chapter 41. Article 20 of the Uniform Code of Military Justice (10 U.S. § 820) provides, in part, that:

". . . No person with respect to whom summary courts-martial have jurisdiction may

Mr. Michael D. Garrett

be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. . . ."

The powers of summary courts-martial under state law are set forth in Section 41.620, RSMo 1969. This section is silent as to specific jurisdiction. Therefore, we believe that Section 41.620 must be read with the clear assimilating provisions of Section 41.590 which provide that a summary court-martial in Missouri ". . . shall be constituted and have cognizance of the same subjects and possess like powers" as summary courts-martial under the Uniform Code of Military Justice. Accordingly, we conclude that, although the punishment provisions of summary courts-martial have been statutorily modified in Missouri by Section 41.620, the basic structure and jurisdiction are identical to a summary court-martial under federal law by virtue of Section 41.590, RSMo 1969.

Since Middendorf, supra, is limited only to trial by summary court-martial, we believe that trial by special or general courts-martial are criminal proceedings within the scope of Article I, Section 17, Constitution of Missouri. Therefore, an accused facing trial by summary court-martial can defeat jurisdiction (unless the offense occurred during a period of duty pursuant to a call of the Governor) by merely objecting as would be his right under Article 20 of the Uniform Code of Military Justice.

It is conceivable that the General Assembly could revise Chapter 41 to provide specifically for jurisdiction and procedure for summary courts-martial in this state and to prohibit an individual from refusing trial by summary court-martial. Certainly, Article III, Section 46, Constitution of Missouri, does not require mandatory conformity with federal military law, but only that Missouri's military law "shall conform . . . as nearly as practicable." Similar language is found in Sections 41.460 and 41.590, RSMo 1969.

We believe that the General Assembly could properly establish summary court-martial jurisdiction and procedure under state law which does not provide an accused the right to refuse trial by summary court-martial and thus subject certain members of the Missouri National Guard to such jurisdiction during periods of duty set forth in 32 U.S.C. §§ 501-505. However, because of the provisions of Article 20, Uniform Code of Military Justice, assimilated by Section 41.590, RSMo 1969, we believe that presently no summary court-martial jurisdiction exists except during periods of state emergency duty as previously discussed.



Mr. Michael D. Garrett

Your second question concerns the authority of commanders of Missouri National Guard to administer nonjudicial punishment under the authority given them by Part IV, Regulation for the Administration of Military Justice for the state of Missouri, a regulation signed by the Governor on December 12, 1972. The power to promulgate regulations dealing with the training and discipline of the Missouri National Guard seems clearly to be vested in the Governor. Although Article III, Section 46, Constitution of Missouri 1945, provides that the General Assembly "shall provide for the . . . regulation . . . of an adequate militia," the power to promulgate regulations necessary for the operation and discipline of the Missouri National Guard rests with the Governor. The Governor is commander-in-chief of the militia when the militia is in state service. Article IV, Section 6, Constitution of Missouri 1945; Section 41.120, RSMo 1969. Additionally, Section 41.090, RSMo 1969, provides:

"The governor shall make and publish such regulations governing the organization, discipline and training of the militia of the state as may be necessary to the efficiency thereof, and such regulations shall have the authority of law, provided that in the case of the national guard, or air national guard and naval militia, regulations promulgated by the governor shall conform to the statutes and regulations of the United States concerning the same."

It is our opinion that the above-noted constitutional and statutory authority clearly permits the Governor to issue those regulations necessary for the administration of discipline in the Missouri National Guard. The portion of the particular regulation to which you refer gives any commanding officer power to impose nonjudicial punishment for minor offenses without trial by court-martial. Section 13(2), Regulation for the Administration of Military Justice for the state of Missouri dated December 12, 1972.

Part IV (Section 13) of the Regulation in question is obviously intended to conform to Article 15 of the Uniform Code of Military Justice which provides for similar nonjudicial punishment for those subject to the Uniform Code of Military Justice. 10 U.S.C. § 815. Promulgation of a regulation to conform discipline in the Missouri National Guard to that of the armed services of the United States seems required in light of Article III, Section 46, Constitution of Missouri 1945, Section 41.020,

Mr. Michael D. Garrett

Section 41.090, and Section 41.460, RSMo 1969. However, it is significant to note that Section 13 of the Missouri Regulation in question does not conform to Article 15 of the Uniform Code of Military Justice in one important area. Article 15 of the Uniform Code of Military Justice provides in part that:

" . . . punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. . . ." (10 U.S.C. § 815(a))

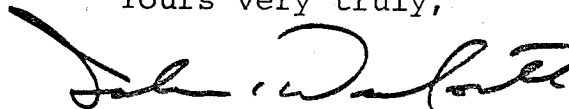
Section 13 of the Regulation for the Administration of Military Justice for the state of Missouri does not provide an opportunity for a member of the Missouri National Guard to demand trial by court-martial in lieu of the nonjudicial punishment. Therefore, a fundamental, statutory principle of nonjudicial punishment, as it exists in the armed forces of the United States, is not present in the state regulation. The absence of this provision, in our opinion, renders Section 13 of the Regulation void in that Section 13 clearly fails to conform to 10 U.S.C. § 815 (Article 15 of the Uniform Code of Military Justice).

The opportunity for a member of the Missouri National Guard to demand trial by court-martial in lieu of nonjudicial punishment, in our opinion, represents a substantial component of nonjudicial punishment in the Uniform Code of Military Justice. Since nonjudicial punishment in Missouri is not a separate statutory means of discipline for the militia, any regulation creating it must conform in all substantial respects to Article 15 of the Uniform Code of Military Justice. Article III, Section 46, Constitution of Missouri 1945; Section 41.020, RSMo 1969; Section 41.090, RSMo 1969; Section 41.460, RSMo 1969. It is obvious that if the state regulation in question were amended to conform with Article 15, Uniform Code of Military Justice, a dilemma would remain because of our opinion that no summary court-martial jurisdiction presently exists. However, this is a defect that only the General Assembly can cure. Accordingly, it is our belief that Part IV of the Regulation for the Administration of Military Justice for the state of Missouri cannot be the basis for the imposition of nonjudicial punishment for members of the Missouri National Guard unless Part IV of the Regulation conforms to the provisions for demanding trial by court-martial as found in Article 15 of the Uniform Code of Military Justice (10 U.S.C. § 815).

Mr. Michael D. Garrett

It is our view that: (1) members of the Missouri National Guard may not be tried by special or general courts-martial, authorized by Chapter 41, RSMo 1969, for offenses committed while performing duty described in 32 U.S.C. § 316 and 32 U.S.C. §§ 501-505 since such duty does not constitute actual service in time of war or public danger and, therefore, any such court-martial would be contrary to the requirements set forth in Article I, Section 17, Constitution of Missouri 1945, which requires indictment or information to precede criminal prosecution for felonies or misdemeanors; (2) members of the Missouri National Guard may not be tried by summary courts-martial for offenses committed while performing such duty, even though a summary court-martial is not a criminal prosecution within the meaning of Article I, Section 17, Constitution of Missouri 1945, because 10 U.S.C. § 820 provides an accused the right to refuse trial by summary court-martial and such a right is present in Missouri by virtue of the assimilation of federal military laws and regulations; (3) commanders of the Missouri National Guard may not administer nonjudicial punishment for minor offenses, under the authority of Part IV, Regulation for the Administration of Military Justice for the state of Missouri, dated December 12, 1972, because Part IV of the Regulation does not provide that a person subject to its provisions can demand trial by court-martial in lieu of nonjudicial punishment and, therefore, Part IV of the Regulation does not conform with the federal statute governing nonjudicial punishment as required by Article III, Section 46, Constitution of Missouri 1945; Section 41.020, RSMo 1969; Section 41.090, RSMo 1969; Section 41.460, RSMo 1969.

Yours very truly,

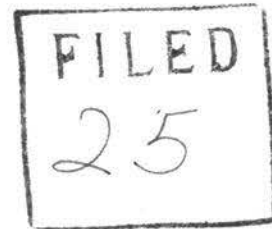


JOHN C. DANFORTH  
Attorney General

February 3, 1976

OPINION LETTER NO. 25  
Answer by letter-Klaffenbach

Honorable Paul L. Bradshaw  
State Senator, District 30  
c/o Senate Post Office, Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Bradshaw:

This letter is in response to your questions asking:

"Section 105.470(3) of C.C.S.S.C.S.H.  
C.S.H.B. 20, 79, 386, 760 and 765, 78th Gen-  
eral Assembly, defines a 'lobbyist' as:

'... any person who receives any  
direct or indirect benefits or ex-  
penses for lobbying activities,  
whether by grant or otherwise, from  
any state, the federal government  
or any private not for profit foun-  
dation or corporation...' (emphasis  
added)

"1. Does this definition include a  
state employee who, acting merely as a pri-  
vate citizen and not in any official capa-  
city or during regular hours of employment,  
asks a member of the General Assembly to  
vote for a bill which might result in a di-  
rect or indirect benefit to such state em-  
ployee? For example, would it include a  
professor of a state university, who re-  
quests added appropriations for higher edu-  
cation--or to a teacher in the public schools  
who urges increased funding for the school  
foundation program--or to any state employee

Honorable Paul L. Bradshaw

who seeks support for an increase in benefits under the state retirement system? Obviously, these persons may expect to receive some 'direct or indirect benefits' as a result of their lobbying activities, but not 'for' the act of lobbying per se.

"2. Similarly, does this definition of a 'lobbyist' include a state employee who, acting merely as a private citizen and not in any official capacity or during regular hours of employment, asks others to contact members of the General Assembly and seek their support of a measure which might result in some direct or indirect benefit to such state employee? For example, would it apply to a caseworker who asks others to contact the members of the Legislature in support of added appropriations for the Division of Family Services?

"3. Would the answers to questions '1' and '2' above, be affected by the fact that such requests by the state employee were done at the command or suggestion of a supervisor of such employee or were made as a part of a concerted plan by the agency, or officials thereof, to influence the course of legislation? If so, how?

"4. If, in fact, such persons are included within the definition of a 'lobbyist' under subsection (3) of the act, are they nonetheless excluded under subsection (4), which applies to 'any person who engages in the activities heretofore described in subdivision (3) on an occasional basis only and not as a regular pattern of conduct and who expends for such purposes no more than one hundred dollars during the legislative session, other than for his own traveling and personal expenses.'. In other words, if one expects to receive personal benefits from his lobbying activities, is he nonetheless exempt from filing and reporting procedures if he lobbies only occasionally and does not spend more than one hundred dollars in the process?"

Honorable Paul L. Bradshaw

The definition of "lobbyist" set forth in your question is only part of the definition provided in Section 105.470, subsection 1(3).<sup>1</sup> The entire definition reads as follows:

"'Lobbyist', any person, including persons employed by or representing federal or state agencies and all political subdivisions thereof, who acts in the course of his employment or who engages himself for pay or for any valuable consideration for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any legislative action by the legislature; or any person who receives any direct or indirect benefits or expenses for lobbying activities, whether by grant or otherwise, from any state, the federal government or any private not for profit foundation or corporation; provided that the term shall not include any member of the General Assembly or elected state officer."  
(Emphasis added)

In answering your questions, we must consider the entire definition of "lobbyist" and not just the segment quoted in the opinion request.

We further note that subsection (6) of Section 105.470 provides for criminal penalties for violations of the section. Therefore, the language of the statute must be strictly construed. State v. Taylor, 133 S.W.2d 336 (Mo. 1939).

In your first question you ask whether the definition of "lobbyist" includes a state employee who, acting merely as a private citizen and not in any official capacity or during regular hours of employment, asks a member of the General Assembly to vote for a bill which might result in a direct or indirect benefit to such state employee. Assuming that the employee in question is not acting in the course of his employment and is not being paid for his efforts to influence the bill, he would not be included within the first part of

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<sup>1</sup>Conference Committee Substitute for Senate Committee Substitute for House Committee Substitute for House Bills Nos. 20, 79, 386, 760, and 765 has been printed in Vernon's Missouri Legislative Service, supplementing Vernon's Annotated Missouri Statutes as Act 119.

Honorable Paul L. Bradshaw

the definition of "lobbyist" in subsection 1(3) of Section 105.470. Furthermore, even if we assume that some direct or indirect benefit will accrue to the state employee personally from the bill, the second part of the definition of "lobbyist" requires that the person receive "direct or indirect benefits or expenses for lobbying activities. . . ." (Emphasis supplied). We believe that the word "for" has a different meaning than the word "from." Therefore, if the state employee does not receive direct or indirect benefits for his activity in attempting to influence legislation, he would not come within that part of the definition.

Your second question asks whether the definition of "lobbyist" includes a state employee acting merely as a private citizen and not in any official capacity who asks others to contact members of the General Assembly and seek support of a measure which might result in some direct or indirect benefit to such state employee. Applying the same reasoning used in answering your first question, and again assuming that such person is not acting in the course of any employment or receiving pay or other valuable consideration for his attempts to influence legislation, we conclude that such employee is not, under these circumstances, a "lobbyist."

In your third question, you inquire whether the answers to the first two questions would be different if the state employee's efforts to influence legislation were done at the command or suggestion of the employee's supervisor. You ask also whether the answers to the first two questions would be different if the state employee's lobbying activities were done as a part of a concerted plan by the agency, or the officials thereof, to influence the course of legislation. If a state employee attempts to influence legislation pursuant to his supervisor's suggestion without any express or implied direction or order, we do not believe the employee would be acting in the course of his employment or for a valuable consideration. However, we recognize that the line between suggestion and command in such a situation might not be readily apparent. An employee could easily assume that a suggestion from a supervisor was, in fact, a command. Therefore, it would be necessary to analyze each situation to determine whether a supervisor made a mere suggestion or whether it was, in fact, an order or command, or could have been understood as such. If a state employee attempts to influence legislation on the command of a supervisor or as part of a concerted plan of action by an agency or the officials thereof to influence legislation, the state employee would be acting "in the course of his employment . . ." to influence legislation and would be receiving a benefit for lobbying activities. Therefore, this state



Honorable Paul L. Bradshaw

employee would be a "lobbyist" unless his lobbying is only occasional in which case he might be a "witness."<sup>2</sup> If such person comes within the definition of "witness," he must comply with the requirements of subsection 3 of Section 105.470. We believe this also answers your fourth question.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

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<sup>2</sup>"Witness" is defined in Section 105.470.1(4) as:

"'Witness', any person who engages in the activities heretofore described in subdivision (3) on an occasional basis only and not as a regular pattern of conduct and who expends for such purposes no more than one hundred dollars during the legislative session, other than for his own traveling and personal expenses."





OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

February 3, 1976

OPINION LETTER NO. 26

Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This letter is in response to your question asking:

"Section 357.170 RSMo 1969 provides in pertinent part: 'Prior cooperative associations.--all cooperative agricultural corporations, companies or associations, coming within the purview of this law, and heretofore organized and doing business under prior statutes and which have attempted so to organize and do business, shall have the benefit of all provisions of this law and be bound thereby on filing with the secretary of state. . . .'

"Query:

Does this section pertain only to those corporations organized and doing business prior to the passage of the law which included Section 357.170 (May 24, 1919); or do the words 'heretofore organized and doing business under prior statutes. . . .' mean those corporations organized previous to any given time of application for authority to accept the provisions of Chapter 357."

You also state that:

"In recent months several corporations organized under other chapters of the law (and

Honorable James C. Kirkpatrick

subsequent to May 24, 1919) have applied for acceptance of the provisions of Chapter 357. In doing so, these corporations have relied upon the provisions of Section 357.170. Inasmuch as Section 357.170 uses the words 'heretofore organized and doing business' rather than using the specific date 'organized and doing business before May 24, 1919,' clarification is requested as to the real meaning of the section."

The full context of the section about which you inquire, Section 357.170, RSMo, is as follows:

"All cooperative agricultural corporations, companies or associations, coming within the purview of this law, and heretofore organized and doing business under prior statutes and which have attempted so to organize and do business, shall have the benefit of all provisions of this law and be bound thereby on filing with the secretary of state a written declaration, signed and sworn to by the president and secretary, to the effect that such cooperative company or association has, by a majority vote of its shareholders, decided to accept the benefits of and to be bound by the provisions of this law."

We understand that the argument has been made that organizations formed after the effective date of Section 357.170, which originates from the Laws of Missouri 1919, p. 116, contend that the questioned language is not intended as a type of savings clause to refer to only those corporations existing prior to the time the law was first enacted. The argument is that the questioned language must mean that organizations can come within Chapter 357 if they are organized and doing business under Missouri statutes at the time they file the declaration with the Secretary of State.

It is conversely argued that the word "heretofore" as used in the section in question has a well-established meaning and that it does in fact refer to corporations existing prior to the effective date of such section which, as we stated, was in 1919.

The use of the word "heretofore" in statutes or in constitutional provisions is not uncommon. Thus, in Section 22(a) of

Honorable James C. Kirkpatrick

Article I of the Missouri Constitution, with respect to the right of trial by jury, it is stated that "the right of trial by jury as heretofore enjoyed shall remain inviolate." There does not appear to be any real question as to the fact that "heretofore" means prior to the effective date of such provisions, and we believe that it would be a strained construction to hold otherwise. See State v. Hamey, 67 S.W. 620 (Mo. 1902).

Therefore, we conclude that such corporations which were organized after the effective date of Section 357.170 are not within the scope of the provisions of said section.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

February 11, 1976

OPINION LETTER NO. 27

Honorable James F. McHenry  
Prosecuting Attorney  
Cole County Courthouse  
Jefferson City, Missouri 65101

Dear Mr. McHenry:

This is in response to your request for an opinion from this office as follows:

"a. Are there any public disclosure or reporting requirements for a committee or not-for-profit corporation which is formed for the purpose of promoting an amendment to the Constitution of Missouri through the initiative process, and which does not promote or expend funds to promote any political party or candidate for office, and, if so, what are they? In this connection it may be assumed that the committee or corporation would not have any designated poll watchers or canvassers at the election.

"b. May a corporation, bank and/or labor organization lawfully make contributions to such a committee or corporation?

"c. In view of the pending constitutional challenges in court to the Campaign Finance and Disclosure Law (Proposition No. 1), should law enforcement officials attempt to enforce the provisions of law 'repealed' by the terms of Proposition No. 1 prohibiting corporate contributions to committees promoting initiative

Honorable James F. McHenry

drives and imposing disclosure and reporting requirements upon such committees promoting initiative drives?

"A number of groups are proposing amendments to the Constitution by the initiative process and some of those groups are proposing offices and operations in Cole County. Such groups propose drives to secure voter signatures on initiative petitions, and campaigns to secure voter approval at an election if such a proposal is placed on the ballot. Such groups are not connected with any political party nor do they support any individual candidates. Such groups contemplate raising funds from individuals, and also, if such may be lawfully done, from corporations, banks or labor organizations."

You also state in the brief you have submitted with your opinion request that:

"It is understood that various questions have been raised relative to the constitutionality of Proposition No. 1 and that the constitutionality thereof is now subject to pending court action. If Proposition No. 1 is unconstitutional in whole or in part, would this have the effect of reinstating the law presumably repealed? It is noted that Section 18 of Proposition No. 1 is a 'severability' provision. Would this provision have the effect of leaving the prior law in a 'repealed' state in the event of a determination of unconstitutionality of the new provisions of Proposition No. 1? The guidance of the Attorney General is requested as to the position which should be taken by Missouri law enforcement officials at present relative to 'enforcing' the provisions of 'law' above noted which preclude contributions by corporations to initiative drives and impose reporting and disclosure requirements with respect thereto, which presumably have been repealed by Proposition No. 1, but which might be considered reinstated in the event Proposition No. 1 is declared unconstitutional by the courts."

Honorable James McHenry

In response to the first two questions you have submitted, we are enclosing herewith Opinion Letter No. 372 issued December 30, 1974, to Donald L. Manford, in which we stated that, in the absence of exceptional circumstances, this office should defer answering questions concerning the interpretation and requirements of Proposition No. 1 since the Missouri Elections Commission is authorized by statute to issue, upon request, opinions upon the requirements of this act and such questions should be submitted to the Commission.

We believe your primary question concerns your duty and liability as a public official in enforcing the provisions of Proposition No. 1 at the present time since you allege that questions have been raised as to the constitutionality of Proposition No. 1 in whole or in part.

Every reasonable presumption is made in favor of the constitutionality of a statute. Varble v. Whitecotton, 190 S.W.2d 244 (Mo. Banc 1945). In 16 C.J.S. Constitutional Law § 82 p. 251, it is stated that as a general rule a public official whose rights are not adversely and injuriously affected by the operation of a statute or ordinance, or the particular feature of it complained of, may not raise the question of its constitutionality.

Concerning the acts done by public officials under a statute later declared to be unconstitutional, the rule is stated in 16 C.J.S. Constitutional Law § 101 p. 480 as follows:

" . . . ministerial officers are authorized to treat every act of the legislature as prima facie valid, and have been held not liable for any acts committed under an unconstitutional statute because of its unconstitutionality. Also, the rule that an unconstitutional law is a nullity cannot be applied to work hardship and impose liability on a public officer who, in performance of his duty, has acted in good faith in reliance on the validity of a statute before any court has declared it invalid; . . . "

In State ex rel. Williamson v. County Court of Barry County, 363 S.W.2d 691 (Mo. 1963), the court stated that ordinarily a public official may not question the constitutionality of a statute as a defense to mandamus to compel him to perform a ministerial duty.

We have been unable to find any appellate court decisions in this state directly in point, and we are relying primarily on theory.

Honorable James McHenry

In Bricker v. Sims, 259 S.W.2d 661 (Tenn. 1953), the court held that even if a city ordinance was unconstitutional, the arresting officers could not be held responsible in damages since they were entitled to act upon the assumption that all public laws and ordinances of municipalities are constitutional. Without deciding whether the ordinance in question was void, the court stated that every act of the legislature is presumptively constitutional until judicially declared otherwise and the oath of office "to obey the Constitution" means to obey the Constitution, not as the officer decides, but as judicially determined. In discussing the general rule that officers are not permitted to question the validity of a statute or city ordinance as a general rule, the court stated, l.c. 664:

"It is certainly true that, under the great weight of authority as established by our own court, the presumption in favor of the constitutionality of a statute is so binding that the public and individuals are bound to treat it as valid. Hence it follows that the public and individuals are compelled, by judicial construction, to assume toward a legislative enactment, precisely the same attitude, whether it be constitutional or unconstitutional."

In Feuchter v. City of St. Louis, 210 S.W.2d 21 (Mo. 1948) concerning the liability of public officials in enforcing the law, the court stated, l.c. 25:

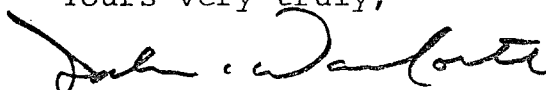
". . . Public officers are not liable for an error of judgment, in line of their official duty and within the scope of their authority, resulting in a wrong decision on questions, such as the one in this case, involving the determination of facts and the application thereto of provisions of law. [43 Am.Jur. 84; Secs. 272-275; State ex rel. Funk v. Turner, 328 Mo. 604, 42 S.W.2d 594; State ex rel. Songer v. Fidelity & Deposit Co., Mo.Sup., 53 S.W.2d 1036, 85 A.L.R. 955; Pike v. Megoun, 44 Mo. 491.] We hold that defendants cannot be held to any personal liability for leaving to the Courts the final decision of the question in this case, upon which there could reasonably have been a difference of opinion, before making substantial payments to plaintiff out of public funds. The city is not

Honorable James McHenry

liable in any event because the defendants were acting as public officers in a governmental capacity. [State ex rel. Gallagher v. Kansas City, 319 Mo. 705, 7 S.W.2d 357, 59 A.L.R. 95.] . . ."

It is our opinion that Proposition No. 1, adopted by the voters by initiative petition and which became effective January 1, 1975, is presumptively constitutional and valid at the present and remains so until declared unconstitutional by an appellate court in this state.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op.Ltr.No. 372  
12-30-74, Manford



June 18, 1976

OPINION LETTER NO. 29  
Answer by Letter - Klaffenbach

Mr. Lawrence L. Graham  
Director, Department of  
Social Services  
Broadway State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Graham:

This opinion letter is in response to your question asking as follows:

"Are the employees of the Board of Probation and Parole, including the Board Members, and the Division of Youth Services covered by the Section 105.710 RSMo., since the implementation of the Omnibus State Reorganization Act of 1974?"

You further state:

"Prior to reorganization the Board of Probation and Parole and Division of Youth Services were under Missouri statutes, sections of the Department of Corrections, although autonomous. Such Department no longer exists, and the Board of Probation and Parole is now a division of the Department of Social Services. Section 105.710 RSMo. lists among others covered by that Section as '... employees and agents of the department of corrections...'. Prior to reorganization this did include all employees of the Board of Probation and Parole, Division of Probation and Parole, and the Division of Youth Services."

Mr. Lawrence L. Graham

Section 105.710, House Bill 1734, 78th General Assembly, does not refer to employees and agents of the Department of Corrections but refers to employees and agents of the Division of Corrections.

Prior to the enactment of the Omnibus State Reorganization Act, Senate Bill No. 1 of the 77th General Assembly, First Extraordinary Session, the Board of Probation and Parole, the Division of Probation and Parole and the Division of Training Schools were divisions of the Department of Corrections. Section 549.300, RSMo; Section 216.010, RSMo; Section 219.030, RSMo. The Reorganization Act transferred the Board of Probation and Parole to the Department of Social Services under a type II transfer and also the powers, duties and functions of the State Board of Training Schools to the Division of Youth Services, Department of Social Services under a type I transfer. See subsections 16 and 17, Section 13 of the Reorganization Act. Under subsection 15 of Section 13 the powers, duties and functions of the Department of Corrections were transferred by type II transfer to the Department of Social Services and a Division of Corrections was established. Further, we understand that the provisions of the Department of Social Services Reorganization Plan of 1974 placed the personnel of the Division of Probation and Parole under the Board of Probation and Parole.

However, it is our view that the type of transfer in this particular case is not significant. That is, the Tort Defense Fund, Section 105.710 was amended in 1974 (House Bill 1734, 78th General Assembly) and it is obvious from the changes which were made that numerous amendments to the Tort Defense Fund Act were made to take into consideration that the executive departments of government had been reorganized. That is, for example, the amendments to Section 105.710 included the director of the Department of Social Services as well as the director of the Division of Corrections, the director of the Division of Family Services, the director of the Department of Mental Health, and made other changes which indicated an awareness that the amendments to Section 105.710 were intended to reflect the changes brought about by reorganization. However, it is significant that the Board of Probation and Parole and the Division of Probation and Parole were not included within the amended coverage of such section and that the Division of Youth Services was not included within the amended coverage of such section.

As we have indicated, the director of the Department of Social Services is expressly covered by the Tort Defense Fund as amended. However, the employees of the Department, as such, are not covered.

Mr. Lawrence L. Graham

It is therefore our view that the Board of Probation and Parole, the Division of Probation and Parole, and the Division of Youth Services are not covered under the provisions of Section 105.710 as amended by the laws of 1974.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

February 11, 1976

OPINION LETTER NO. 30

Honorable Robert S. Drake, Jr.  
Prosecuting Attorney  
Benton County Courthouse  
Warsaw, Missouri 65355

Dear Mr. Drake:

This is in response to your request for an opinion from this office as follows:

"Can the boundaries of the two road districts established in Benton County differ from the boundaries of the voting districts in Benton County established pursuant to Section 49.010, thereby depriving certain members of the county the right to vote for the county court judge who controls the maintenance and construction of the roads in their district?

"Historically, the Osage River has operated as the dividing line in Benton County, both for the voting districts electing the north side and south side county judges and for the two common road districts located in the county. In approximately 1973, the voting districts were changed to include Lindsey Township in the voting district of the south side judge. Lindsey Township lies north of the river but all of the roads in Lindsey Township are under the direct supervision of the north side judge. The north side judge and the south side judge operate as the overseers of the roads in their district and have complete discretion as to

Honorable Robert S. Drake, Jr.

what maintenance and construction work is done on the roads. The south side judge has had numerous complaints from the voters of Lindsey Township concerning the condition of their roads, but the maintenance of the roads is supervised by the north side judge who is not voted on by the residents of Lindsey Township. As a practical matter, the great majority of the residents of Benton County feel that the major job of the north and south side judges is that of road overseer, and under the current situation, the south side judge cannot exercise any discretion concerning the roads that lie in that portion of his voting district lying north of the river."

You further state that:

"Beginning in January of 1972 the district's line for the two County Court Judges were changed by moving one township, Lindsey Township, from the north side County Judge's district to the south side County Judge's district. The lines for Road District #1 and Road District #2 have not been changed. At the present time the residents of Lindsey Township are in Road District #1 or the North side road district while they vote for the south side Judge."

You further state in your memorandum:

"The question is whether or not a common road district must be a part of the County Court District in which the residents of the common road district vote."

Benton County is a third class county.

We do not, in this opinion letter, pass on the validity of the action of the county court in allegedly giving exclusive authority over roads and bridges in a certain area to one associate county judge and exclusive authority over roads and bridges in the rest of the county to the other associate county judge. See Sections 49.140 and 49.150, RSMo. In this opinion letter, we confine ourselves to passing on the question of whether there is any relationship between the boundaries of common road districts and county court judge districts.

Honorable Robert S. Drake, Jr.

You state in the memorandum you have submitted that you were unable to find any statute or court decision upon this matter. Likewise, we have been unable to find any statute or court decision involving this precise question and must rely on our interpretation of the statutes involved.

Section 49.010, RSMo, provides as follows:

"The county court shall be composed of three members, to be styled judges of the county court, and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships."

Under this statute, the judges of the county court are required to divide their county into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships. It is our view that this is a matter of discretion for the county court to determine the boundary lines of each district as provided in Section 49.010.

The statute providing for the county court to divide counties not under township organization into common road districts is found in Section 231.010, RSMo, which provides as follows:

"The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

Under this statute, the county court has authority to establish common road districts in their county, determine their number and size, and express authority to change the boundaries of any such road district as the best interest of the public may require. This likewise is a matter of discretion as to the size of the district and boundaries of each road district.

Honorable Robert S. Drake, Jr.

We find no requirement that the boundaries of a county court judge district coincide with the boundaries of one or more common road districts, and we find no relationship as a matter of law between the boundaries of county court judge districts and the boundaries of common road districts.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

February 4, 1976

OPINION LETTER NO. 31

Honorable Christopher S. Bond  
Governor of Missouri  
Executive Office  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Governor Bond:

This letter is in answer to your question stated as follows:

"Is Mrs. Christopher S. Bond a 'lobbyist' as that term is defined in Section 105.470, and must she register as a lobbyist under that Section?"

It is our understanding that Mrs. Bond may appear before legislative committees and discuss proposed legislation with members of the General Assembly. However, you have informed us that she receives no compensation or any direct or indirect benefits in consideration for lobbying activities. Mrs. Bond is not employed to serve as a lobbyist by any individual or organization, and her only interest in legislation is as an informed citizen.

Section 105.470, RSMo 1969, as amended (C.C.S.S.C.S.H.C.S. House Bills Nos. 20, 79, 386, 760 and 765, 78th General Assembly), requires registration by lobbyists. The term "lobbyist" is defined in Section 105.470.1(3) as:

"[a]ny person, including persons employed by or representing federal or state agencies and all political subdivisions thereof, who acts in the course of his employment or who engages himself for pay or for any valuable



Honorable Christopher S. Bond

consideration for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any legislative action by the legislature; or any person who receives any direct or indirect benefits or expenses for lobbying activities, whether by grant or otherwise, from any state, the federal government or any private not for profit foundation or corporation; provided that the term shall not include any member of the General Assembly or elected state officer."

We enclose Opinion Letter No. 25, rendered February 3, 1976, to Senator Paul L. Bradshaw, which discusses the activities which bring a person within the definition of "lobbyist."

It is our view that in the premises Mrs. Bond is not a "lobbyist" as defined and that she is not required to register pursuant to Section 105.470.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. Ltr. No. 25  
2-3-76, Bradshaw



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 29, 1976

OPINION LETTER NO. 33

Honorable Bud Fendler  
Representative, District 104  
Room 402, State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Fendler:

This letter is in response to your request for an opinion from this office as follows:

"Section 321.245 Sub-Section 2 Paragraph 4  
R.S. Mo. 1969.

"This section in question, reads as follows.

Each Dispatching Center shall employ sufficient personnel to insure that no person will be required to be on duty without at least twelve hours between shifts.

"Does the language of Section 321.245 Sub-section 2 Paragraph 4 R.S. Mo. 1969, restrict Dispatchers from working with less than 12 hours between work shifts.

"The question arises when a dispatcher volunteers to work in the place of a Dispatcher who is on Vacation or Sick leave.

"We work on a 40 hour work week, 8 hours daily, with rotating shifts.

"Before a Dispatcher goes on Vacation, a list of the days available for overtime is posted,

Honorable Bud Fendler

this is then picked by Dispatchers on a Voluntary basis, with the Dispatcher with the lowest amount of overtime having first choice of the days listed. Should a Dispatcher choose not to work, it then goes to the next Dispatcher with the next lowest amount of overtime and so on. They may choose the overtime to fall on one of their days off or to work an extra 8 hours on the day of their choice.

"This has been the way we have worked overtime since the Dispatching Center was formed in 1968."

Section 321.245, subdivision 4, to which you refer, provides as follows:

"Each dispatching center shall employ sufficient personnel to insure that no person will be required to be on duty without at least twelve hours between shifts."

The above-statutory provision provides that sufficient personnel be employed to insure that no person will be required to be on duty without at least twelve hours between shifts. It does not prohibit a person from voluntarily working without twelve hours between shifts if the board of directors of the fire protection district authorizes such employment. This is a matter for the board of directors to determine.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

February 23, 1976

OPINION LETTER NO. 34  
Answer by Letter - Klaffenbach

Honorable Emory Melton  
Missouri Senator, District 29  
Room 331A, Capitol Building  
Jefferson City, Missouri 65101

FILED

34

Dear Senator Melton:

This letter is in response to your opinion request asking as follows:

"A special road district organized and existing under MRS Sections 233.170 to 233.315 is adjacent to a city of the 4th class. The special road district and the city have a common boundary. The city then annexes a portion of the territory which lies within the special road district. Which of these two political subdivisions has control or jurisdiction over the streets and roads in the annexed territory after the annexation is completed and that territory becomes a part of the city?"

In our Opinion No. 97 dated June 28, 1961, to Wilson, which was withdrawn for other reasons, this office concluded that the annexation of a special road district by a city was not an authorized form of dissolution and that the district remained in existence within its present boundaries until dissolved by one of the statutory methods.

Under subsection 3 of Section 88.670, RSMo, however, a fourth class city has control of the streets within such city. Further, in Opinion No. 309 dated August 28, 1969, to Nevins, copy enclosed,

Honorable Emory Melton

this office concluded that the commissioners of a special road district organized under the provisions of Section 233.170, RSMo, and located within a fourth class county do not have the authority to make street improvements on roads within an incorporated city of the fourth class.

We therefore conclude that while annexation of a part of the district does not cause a partial dissolution of the district the city into which the land is annexed assumes control of the road district lands so annexed. The road district commissioners thereafter have no authority to spend road district funds for the improvement or maintaining of such annexed roads.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 309  
8-28-69, Nevins



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
**JEFFERSON CITY**

February 27, 1976

OPINION LETTER NO. 36

Honorable Bob F. Griffin  
Representative, District 10  
Room 400B, State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Griffin:

This is in response to your request for an opinion from this office as follows:

"When a Statute establishes a certain population count in a city or county as prerequisite to utilizing provisions of that law to take some action, is the last federal decennial census taken for that city or county controlling or would a later special census conducted in accordance with Section 71.160, RSMo 1969 be compelling? Section 182.140, RSMo 1969 establishes the procedure for establishing a free public library in a city now or hereafter containing more than 5,000 or less than 600,000 inhabitants.

"I have introduced legislation to reduce the minimum population requirement to 4,000 in order that the City of Cameron might take advantage of this law because after having taken a special census as provided by Section 71.160, RSMo 1969, the City's population was determined to be 4,500. However, the population of the City of Cameron established by the 1970 federal decennial census was fixed at 3,960."

Honorable Bob F. Griffin

Section 182.140, RSMo, to which you refer, provides for any city now or hereinafter containing more than 5,000 and less than 600,000 inhabitants may submit to the voters a proposition for an annual tax to be levied for the establishment and maintenance of a free public library in the city as provided therein. We understand that the City of Cameron has a population of 3,960 according to the 1970 federal decennial census but that the city's population was determined to be 4,500 under a special census that was taken by the city as provided for in Section 71.160, RSMo. You inquire whether the population as determined by the federal census or the population as determined by the special census would govern if the minimum population requirement under Section 182.140, RSMo, was reduced to 4,000.

Statutory provisions for the taking of a special census by any incorporated city or town is provided for in Sections 71.160, 71.170, and 71.180, RSMo. Section 71.170, RSMo, provides in part:

" . . . Upon the completion of such census, the supervisor shall certify the result thereof to the secretary of state, and, from and after the date of the filing of such certificate with the secretary of state, the population of such city or town, as given in such certificate of the supervisor, shall be the legal census and population of such city or town, for all purposes whatsoever, under the constitution and laws of the state."

It is our view that the census population of the City of Cameron as determined by the special census would govern over the census as determined by the decennial census in determining whether the City of Cameron could establish a public library under the provisions of Section 182.140, RSMo.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
JEFFERSON CITY

February 24, 1976

OPINION LETTER NO. 37

Honorable John W. Reid, II  
Prosecuting Attorney  
Madison County  
148 East Main Street  
Fredericktown, Missouri 63645

Dear Mr. Reid:

This letter is in response to your opinion request in which you ask:

"Whether a County Hospital Board's by-laws pursuant to 1971 R.S. Mo, Section 205.195 may require that all physicians, podiatrists and dentists be required to carry and keep in force a minimum of \$100,000.00 malpractice insurance before being permitted to practice in a County Hospital established under 1969 R.S. Mo., Section 205.160."

You also state that:

"I have been contacted by the Madison Memorial Hospital Administrator inquiring whether the County Hospital Board has the authority to pass a by-law requiring all physicians to carry and keep in force a minimum of \$100,000.00 malpractice insurance."

Our research has disclosed two cases of note both dealing with hospitals which are subject to suit by individuals. That is, in Pollock v. Methodist Hospital, 392 F.Supp. 393 (E.D. La. 1975), the District Court held that a requirement that a physician carry malpractice insurance as a condition of his employment at a private hospital is not per se unreasonable and does not violate the physician's civil rights. The sole issue presented in that case was



Honorable John W. Reid, II

the legal right of a hospital to suspend a staff physician for failure to comply with his insurance requirements. There was no issue concerning sufficiency of notice, hardship, or other aspects of due process. The plaintiff did not contend that the amount of insurance, one million dollars in that instance, was unreasonable or that it imposed a financial burden upon him. The court found that the test is one of reasonableness of the regulations and that since the physicians were free to choose any insurance company the question of a violation of the anti-trust laws was not properly indicated.

A second noteworthy case in the area is Rosner v. Peninsula Hospital District, 224 Cal.App.2d 115, 36 Cal.Rptr. 332 (1964), which was distinguished by the court in the Pollock case on the basis that the California case turned solely on the interpretation of a state statute and had little relevance in determining whether plaintiff's civil rights were violated. Notably in the Rosner case, the appellants contended that, since the removal of the rule of sovereign immunity from district hospitals because of California court decisions, the requirement that malpractice insurance be carried by each member of a medical staff was a most reasonable requirement and necessary for the proper administration of a public hospital. While the California court did largely rest its determination upon the apparently limiting language of the California law, it also noted that the nature of a public hospital imposes an actual although implied limitation upon the authority of the hospital to restrict arbitrarily the use of the hospital by the public whether physician or patient. Notably, the court also held that, under the facts before it, whether any doctor could ever become a member of the medical staff depended upon conditions beyond the control of the district because by the adoption of the resolution the hospital unlawfully delegated to the insurance companies a determination as to what physicians may use its facilities. It was the court's view that such a power to determine who has the authority to engage in an otherwise lawful enterprise may not be delegated to a private body unless the power is accompanied by adequate safeguards which afford the applicant protection against arbitrary or self-motivated action.

We wish to point out, of course, that in Missouri the county hospitals still retain their immunity despite the rule of the Supreme Court in Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599 (Mo.Banc 1969) and Garnier v. St. Andrew Presbyterian Church of St. Louis, 446 S.W.2d 607 (Mo.Banc 1969). See our Opinion No. 15 dated May 10, 1971, to Millan (copy enclosed).

We also call your attention to Opinion No. 29 dated March 11, 1975, which was addressed to you, concerning whether the county hospital may contract to limit a physician's practice to emergency room

Honorable John W. Reid, II

duties. In that opinion we quoted and discussed the effect of statutes which, in our view under the facts then presented, did not justify the trustees in denying the doctor the right to treat patients in the hospital other than in the emergency room.

We have found no case where such a malpractice requirement has been sought to be imposed by a hospital which enjoys sovereign immunity. We understand from you that the reason for such a bylaw would be to protect any patient who was a victim of malpractice.

Bearing in mind that we are not conversant with the particular circumstances surrounding the operation of the hospital or the physicians subject to such bylaws, it is our view that there is a serious question as to the reasonableness of such rule.

It is our view that our courts would most likely view such a bylaw as being beyond the authority of the county hospital board of trustees.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 15  
5-10-71, Millan

COMPENSATION:  
REVENUE SHARING:  
DEPUTY COLLECTORS:  
COUNTY COLLECTORS:

Federal revenue sharing funds received by McDonald County may not be used to supplement the compensation of deputy county collectors.

OPINION NO. 39

March 10, 1976

Honorable James L. Paul  
Prosecuting Attorney  
McDonald County Courthouse  
Pineville, Missouri 64856



Dear Mr. Paul:

This is in response to your request for an opinion from this office as follows:

"May the County Court of a third class county pay additional monies to the deputies of the county collector for the performance of collector's duties which have been added with no compensation paid therefor. In this particular instance, McDonald County, a third class County, the need for the collector is two additional deputies and their maximum salary is computed in 1974 as being \$3850.00 and neither of said deputies are willing to continue full time duty at that salary. Is it illegal to supplement the deputies' pay in the collector's office from revenue sharing funds?

"In 1975 the County Court supplemented the salaries of the two deputy collectors in the budget and paid the supplemental salary from revenue sharing funds. Following the audit by the State Auditor this was disallowed as unauthorized expenditures."

McDonald County is a third class county.

You inquire whether federal funds received under the federal revenue sharing act may be used by the county court to supplement the compensation received by deputies of the county collector.

Section 52.280, RSMo, provides as follows:

Honorable James L. Paul

"In addition to the maximum amount of fees and commissions permitted to be retained by county collectors in sections 52.260 and 52.270, each collector in counties of the third and fourth classes may retain for the payment of deputy and clerical hire a sum not to exceed seventy percent of the maximum amount of fees and commissions which the officer is permitted to retain by the sections, but the deputy and clerical hire is payable out of fees and commissions earned and collected by the officer only, and not from general revenue."  
(Emphasis supplied)

Under this statutory provision, the maximum amount of fees and commissions permitted to be retained by county collectors in third class counties for the payment of deputy and clerical hire shall not exceed seventy percent of the maximum amount the officer is permitted to retain but the deputy hire is payable only from fees collected by the officer and not from general revenue. This statute expressly prohibits general revenue funds from being used to pay the salary of deputy collectors in a third class county.

In Alexander v. Stoddard County, 210 S.W.2d 107 (Mo. 1948), the issue was whether the treasurer and ex-officio collector of Stoddard County was entitled to recover from the county's general revenue account an amount expended by him for the salary of a deputy hired by him in view of the express statutory provision limiting the source of the deputy's pay to the fees and commissions earned by the office. In discussing this matter the court stated, l.c. 109, as follows:

"In any event the legislature has the power to fix and limit the salaries of deputies and 'As a general rule compensation for services rendered by assistants, deputies, and other employees can be allowed directly to them or to their superiors only as authorized by law; and where no provision is made for the payment, or for the appointment or employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement. \* \* \* Under other statutes deputies are to be paid by the principal out of the fees received by him in

Honorable James L. Paul

excess of the amount which he is to retain for himself, and the county is not liable for the salaries of such deputies.' . . ."

It is our view that general revenue funds of the county cannot be used to pay the salaries of deputy collectors or for clerical hire under the provisions of Section 52.280.

Section 123(a)(4), Public Law 92-512, the State and Local Fiscal Assistance Act of 1972, provides that a local unit of government, in order to qualify for the receipt of revenue sharing funds, must satisfy the Secretary of the Treasury that:

"it will provide for the expenditure of amounts received under subtitle A only in accordance with the laws and procedures applicable to the expenditure of its own revenues; . . ."

It is our view that federal funds received under the federal revenue sharing program cannot be used by McDonald County to supplement the compensation paid by the county collector for deputy hire.

#### CONCLUSION

It is the opinion of this office that federal revenue sharing funds received by McDonald County may not be used to supplement the compensation of deputy county collectors.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

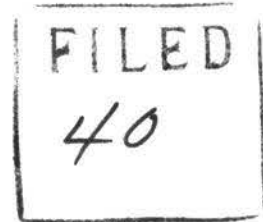
Yours very truly,



JOHN C. DANFORTH  
Attorney General

February 11, 1976

OPINION LETTER NO. 40  
Answer by letter-Klaffenbach



Honorable Donald L. Manford  
State Senator, District 8  
Room 334, State Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Manford:

This letter is in response to your question asking:

"Do contributions to a campaign fund for the benefit of a candidate for the Missouri General Assembly constitute a gift, honorarium or thing of value to be reported as such under the new Missouri Lobbyist Law and is the same true of the purchase of tickets to a dinner, cocktail party or other 'fund raiser'?"

The act to which you refer is C.C.S.S.C.S.H.C.S. House Bills Nos. 20, 79, 386, 760, and 765, 78th General Assembly.

That portion of the act which has particular reference to your question is subsection 4 of Section 105.470 which provides in full as follows:

"Within ten days after the convening of any regular or special session of the general assembly, and forty-five days before the adjournment of any regular session, and within thirty days after each session in each year in which a lobbyist continues to engage in any activity described in subdivision (3) of section 1, each lobbyist shall file with the chief clerk of the house of representatives and the secretary of the senate on standardized forms prescribed by the chief clerk and

Honorable Donald L. Manford

the secretary of the senate reports which shall include a sworn statement setting forth the following:

(1) The lobbyist's total expenditures on lobbying and an itemized statement of such expenditures into at least the following categories: printing and publication expenses; media and other advertising expenses; travel; and entertainment;

(2) A list showing the name of the recipient and amount of each honorarium, gift or loan, including a service or anything of value exceeding in the aggregate the value of, or an amount in excess of, twenty-five dollars, paid or provided during any calendar month to or for an official in the legislative branch;

(3) For each principal by whom the lobbyist was employed, or in whose behalf he acted, separate statements of the proposed legislation or legislative action which the lobbyist supported or opposed;

(4) The reports required herein shall cover the time periods since the filing of the last report or since the lobbyist's employment or representation began, whichever is most recent."

It should be noted that subdivision (2) of subsection 4, above quoted, requires that the sworn statement list the name of the recipient and the amount of each honorarium, gift, or loan, including a service or anything of value exceeding in the aggregate the value of, or an amount in excess of, twenty-five dollars, paid or provided during any calendar month to or for any official in the legislative branch.

Obviously, gifts by lobbyists to candidates who are not presently incumbents of the General Assembly are not gifts to or for "an official in the legislative branch." On the other hand, gifts that are made by lobbyists either directly or indirectly to or for an official in the legislative branch come within the provisions of the above section even though such gifts may be for political campaigning or other purposes.

Honorable Donald L. Manford

We conclude, therefore, that, if the candidate is presently an incumbent of the General Assembly, campaign contributions, dinner, cocktail, and fund raiser tickets in excess of twenty-five dollars a calendar month are gifts which are required to be reported by lobbyists under subdivision (2) of subsection 4 of Section 105.470.

In addition, all expenditures by lobbyists must be reported under subdivision (1) of subsection 4 of Section 105.470.

Yours very truly,

JOHN C. DANFORTH  
Attorney General



May 18, 1976

OPINION LETTER NO. 41  
Answer by letter- Dean



Mr. Michael D. Garrett, Director  
Department of Public Safety  
P. O. Box 749  
Jefferson City, Missouri 65101

Dear Mr. Garrett:

This letter is issued in response to your recent request for a ruling on the following questions:

- "1. Does a suspended imposition of sentence in Missouri constitute a conviction?
- "2. How is a suspended imposition of sentence to be treated in relation to Sections 610.100-610.115, RSMo Supp. 1973?
- "3. Who is responsible for providing information of disposition of cases to the Missouri State Highway Patrol?"

It is our understanding from our conversations with you that all three questions refer to the operation of Sections 610.100-610.115, RSMo Supp. 1973, as they relate to the criminal record keeping duties of the Missouri State Highway Patrol.

In response to your first question, it is our opinion that a suspended imposition of sentence is not a conviction under Missouri law. That has previously been the opinion of this office. See Opinion No. 232 dated August 11, 1966; Opinion No. 518 dated December 6, 1966; and Opinion No. 129 dated May 18, 1973, copies of which are attached for your use.

The following quotation from State v. Gordon, 344 S.W.2d 69 (Mo. 1961), is indicative of the reasoning in this area:

Mr. Michael D. Garrett

" . . . A suspended sentence is 'a suspension of active proceedings in a criminal prosecution. It is not a final judgment \* \* \*.' 24 C.J.S. Criminal Law § 1571, p. 47. The phrase 'suspended sentence' is not a 'sentence' at all but is used to describe the act of withholding the 'sentence' in a case. A 'suspended sentence' is not a 'sentence' within the meaning of that word as used in amended Section 556.280, supra. . . ." Id. at 71.

See also State v. Crate, 493 S.W.2d 1 (Mo.Ct.App. at St.L. 1973), and Meyer v. Missouri Real Estate Commission, 183 S.W.2d 342 (K.C. Mo.App. 1944). In the Meyer case the court stated:

" . . . a person is not deemed to have been convicted unless it is shown that a judgment is pronounced upon a verdict or plea of guilty. . . ." Id. at 347.

Your second question then is how a suspended imposition of sentence is to be treated in relation to Sections 610.100-610.115, RSMo Supp. 1973? The pertinent provisions are as follows:

"If any person is arrested and not charged with an offense against the law within thirty days of his arrest, all records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records to all persons except the person arrested. If there is no conviction within one year after the records are closed, all records of the arrest and of any detention or confinement incident thereto shall be expunged in any city or county having a population of five hundred thousand or more." Section 610.100, RSMo Supp. 1973

"If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged." Section 610.105, RSMo Supp. 1973.

Mr. Michael D. Garrett

"No person as to whom such records have become closed records or as to whom such records have been expunged shall thereafter, under any provision of law, be held to be guilty of perjury or otherwise of giving a false statement by reason of his failure to recite or acknowledge such arrest or trial in response to any inquiry made of him for any purpose." Section 610.110, RSMo Supp. 1973.

"Any person who willfully violates any provision of sections 610.100 or 610.105 is guilty of a misdemeanor and, upon conviction thereof, shall be punished as provided by law." Section 610.115, RSMo Supp. 1973.

Obviously, Sections 610.110 and 610.115 have no relation to your question.

Assuming that the charge that resulted in the suspended imposition of sentence was filed within thirty days of the arrest, Section 610.100 would have no application since it applies only in situations where an arrest has not been followed by a charge within thirty days.

Section 610.105 has no effect in a situation where suspended imposition of sentence has been made since the case has not been nolle prossed, dismissed, or resulted in a verdict of not guilty. It is simply a continuing or pending case, and the record of the arrest and charge may be carried as such by you. This is true since a suspended imposition of sentence generally is accompanied by imposition of a period of probation or parole, the terms of which, if violated, could result in imposition of sentence.

Therefore, in relation to your second question, it is our opinion that Sections 610.100-610.115 do not affect, in any way, the record of a suspended imposition of sentence which should be treated by you as a pending case.

As we noted in Opinion No. 299 dated September 28, 1973, if the person is charged with an offense within thirty days of his arrest, even if his case is still pending one year after he has been charged, the record remains open. Such a record could only become closed under the circumstances set forth in Section 610.105, i.e., if the case is nolle prossed, dismissed, or the accused found not guilty in the court in which the action is prosecuted, or as

Mr. Michael D. Garrett

otherwise provided by law, e.g., under Section 195.290, RSMo Supp. 1971. A copy of this opinion is attached for your use.

Your final question is: "Who is responsible for providing information of disposition of cases to the Missouri State Highway Patrol?" Again, we note that this question is asked in reference to Sections 610.100-610.115, RSMo Supp. 1973, and the Patrol's record keeping duties in relation thereto.

In reference to this question, we believe that the following from Opinion No. 109 dated March 25, 1974, is appropriate:

"Your next question asks whether anyone has an obligation to advise law enforcement officials that a case was nolle prossed, dismissed, or resulted in a finding of not guilty. Nothing in Section 610.105 directly imposes such an obligation on any person. However, as we pointed out above, the records of law enforcement agencies as well as those of courts are to be closed upon nolle prosequi, dismissal, or a finding of not guilty. Clearly the law enforcement agencies cannot close their records unless they are informed of the outcome of the case.

"The statute gives us little guidance in this matter, but we believe that the most sensible procedure is to place the responsibility (for informing law enforcement officials of the outcome of the case) upon those persons who are most likely to know the identity of the pertinent law enforcement agencies. Ordinarily, this would mean the prosecuting attorney, who would of course be aware of all the court's rulings. However, if the law enforcement agencies he notifies of the disposition of the case are aware of other agencies which also have records pertaining to the case, they should inform such other agencies themselves."

Our conclusion in that opinion regarding this question was:

"2. The obligation to advise persons and agencies holding records pertaining to the case of a defendant who has been nolle

Mr. Michael D. Garrett

prossed, dismissed, or found not guilty, rests upon those who are aware that such persons and agencies possess such records, and who are aware of the outcome of the case. Primarily this responsibility devolves upon the prosecuting attorney."

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 232  
Gepford, 8-11-66

Op. No. 518  
Board of Election Commissioners  
of Kansas City, Missouri, 12-6-66

Op. No. 299  
McNeal, 9-28-73



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 8, 1976

OPINION LETTER NO. 42

Honorable Richard J. DeCoster  
State Representative  
407 Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. DeCoster:

This letter is in response to your opinion request asking as follows:

"If a county would adopt a charter under the provisions of Section 18, Article VI of the constitution of Missouri as proposed in the perfected copy of HJR 58, Second Regular Session, 78th General Assembly which said charter contained no provisions prohibited by the constitution and/or laws of the state, would the subsequent adoption of a constitutional provision or enactment of a law prohibiting a provision contained in the charter nullify or void the provision of the charter?"

House Joint Resolution No. 58 of the 78th General Assembly as perfected, to which you refer, is a proposed joint resolution submitting to the qualified voters of Missouri an amendment repealing Sections 18(a), 18(b) and 18(f) of Article VI of the Constitution of Missouri relating to special charters for counties and adopting four new sections in lieu thereof.

The pertinent section to which you refer is Section 18(b) which provides:

"The charter shall provide for its amendment, for the form of the county government,

Honorable Richard J. DeCoster

the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers [prescribed] not prohibited by the constitution and laws of the state."

Obviously, a basic question to be determined with respect to any constitutional provision or law and its effect on such a charter is the intent of the people in adopting such constitutional provision or the intent of the legislature in enacting such law.

It has been stated on numerous occasions that the prohibition contained in Section 13 of Article I of the Missouri Constitution against retrospective or retroactive legislation is for the protection of the citizens and not for the state. Graham Paper Co. v. Gehner, 59 S.W.2d 49 (Mo.Banc 1933). This means that the legislature does have the authority to enact laws which are retrospective to the extent that they may affect only political subdivisions, such as counties, of this state and which do not affect the rights of individual citizens. Retrospective laws which affect the rights of individuals are the type of laws which are prohibited by the Bill of Rights of the Missouri Constitution.

It is our view that the provisions of Section 18(b) as proposed would mean that the adoption of a constitutional provision or the enactment of a law prohibiting a provision contained in the charter would nullify conflicting provisions of an existing charter under Section 18(b).

It is thus our view that this proposed provision means that a county charter provision which is contrary to a constitutional or statutory provision is invalid whether such constitutional or statutory provision is enacted prior to or after the framing of such county charter.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 8, 1976

OPINION LETTER NO. 45

Mr. Lawrence L. Graham, Director  
Department of Social Services  
Broadway State Office Building  
Jefferson City, Missouri 65101

Dear Mr. Graham:

You desire to know if the Division of Family Services of the Department of Social Services of Missouri is the sole state agency to administer the plan submitted to the Secretary of Health, Education and Welfare of the United States as a condition of the state's participation in a program of vocational rehabilitation services for the blind pursuant to the Rehabilitation Services Act of 1973 (P.L. 93-112), 29 U.S.C.A. §§ 701, et seq. That act contains the following provision:

" . . . [w]here under the State's law the State agency for the blind or other agency which provides assistance or services to the adult blind, is authorized to provide vocational rehabilitation services to such individuals, such agency may be designated as the sole State agency to administer the part of the plan under which vocational rehabilitation services are provided for the blind. . . ."  
29 U.S.C.A. § 721.

Section 207.010, RSMo Supp. 1973, provides that the division of family services is an integral part of the department of social services, and shall be the state agency to administer state plans and laws involving pensions and services for the blind.



Mr. Lawrence L. Graham

Accordingly, we believe that the Division of Family Services of the Department of Social Services is the sole state agency to administer the Missouri plan for vocational rehabilitation services to the blind pursuant to the Rehabilitation Services Act of 1973.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 10, 1976

OPINION LETTER NO. 46

Honorable Steve Vossmeier  
State Representative, District 86  
Room 412, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Vossmeier:

This opinion letter is being issued in response to your request for a ruling on the following question:

Does Section 43.180, RSMo 1969, authorize the Missouri State Highway Patrol to investigate criminal activities even though not requested to do so by the sheriff of a county or by the chief of police of a city?

Section 43.180, RSMo, provides:

"The members of the state highway patrol, with the exception of the director of radio and radio personnel, shall have full power and authority as now or hereafter vested by law in peace officers when working with and at the special request of the sheriff of any county, or the chief of police of any city, or under the direction of the superintendent of the state highway patrol, or in the arrest of anyone violating any law in their presence or in the apprehension and arrest of any fugitive from justice on any felony violation. The members of the state highway patrol shall have full power and authority to make investigations connected with any crime of any nature. The expense for the patrol's operation under this section shall be paid monthly by the state

Honorable Steve Vossmeier

treasurer chargeable to the general revenue fund, provided, however, the amount appropriated from the general revenue fund shall not exceed ten percent of the total amount appropriated for the Missouri state highway patrol."

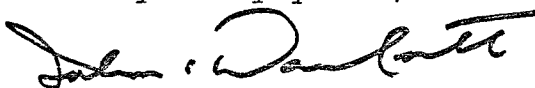
It is our conclusion, based on the foregoing, that a member of the Missouri Highway Patrol is authorized to investigate alleged crimes even if not requested to do so by a county sheriff or a city chief of police.

Section 43.180, RSMo, states that a Missouri Highway Patrolman shall have all powers vested in police officers of this state when working with or at the request of a county sheriff or a city chief of police, or under the direction of the superintendent of the State Highway Patrol. This provision is phrased in the disjunctive. Hence, any Highway Patrol member acting solely under the direction of the superintendent of the Highway Patrol has full police authority. He need not always be working in conjunction with or at the request of a county sheriff or a city chief of police. To insure that there was no mistake as to the parameters of the Highway Patrol's authority under this provision, the legislature in Section 43.180, RSMo, specifically provides that the Highway Patrol shall have full authority to investigate "any crime of any nature."

This power of the State Highway Patrol to investigate criminal activities was referred to by the Missouri Supreme Court in State v. Campbell, 262 S.W.2d 5 (Mo. 1953). In that case, a private citizen notified the Highway Patrol that certain property had been stolen from his truck. The Highway Patrol investigated the complaint and eventually arrested Campbell. At no time during the investigation and arrest did the Highway Patrol act in concert with or at the request of any local law enforcement official. The Missouri Supreme Court's decision fully recognized the Highway Patrol's authority to make such an independent investigation. The Court, in fact, noted that the Highway Patrol was required to investigate criminal activities that came to their attention and to act upon any information which they might gather. State v. Campbell, supra, at 8.

It is, therefore, our view that the Missouri State Highway Patrol has full authority to investigate criminal activity even though not requested to do so by a county sheriff or a city chief of police.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

March 16, 1976

OPINION LETTER NO. 47

Honorable Steve Vossmeier  
Representative, District 86  
Room 412, State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Vossmeier:

This opinion letter is being issued in response to your request for a ruling on the following two questions:

- a. Is the Missouri State Highway Patrol authorized to use highway funds to meet the expenses of criminal investigations conducted pursuant to Section 43.180, RSMo 1969?
- b. Can highway funds be allocated to provide for retirement benefits for members of the Highway Patrol engaged in criminal investigation?

It is the conclusion of this office that the answer to both of the above questions is no.

Section 43.180, RSMo 1969, provides:

"The members of the state highway patrol, with the exception of the director of radio and radio personnel, shall have full power and authority as now or hereafter vested by law in peace officers when working with and at the special request of the sheriff of any county, or the chief of

Honorable Steve Vossmeier

police of any city, or under the direction of the superintendent of the state highway patrol, or in the arrest of anyone violating any law in their presence or in the apprehension and arrest of any fugitive from justice on any felony violation. The members of the state highway patrol shall have full power and authority to make investigations connected with any crime of any nature. The expense for the patrol's operation under this section shall be paid monthly by the state treasurer chargeable to the general revenue fund, provided, however, the amount appropriated from the general revenue fund shall not exceed ten percent of the total amount appropriated for the Missouri state highway patrol."

This section specifically states that all activities authorized by it are to be paid for from the state's general revenue fund. There is no statutory or constitutional definition of "general revenue fund." State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973). However, State ex rel. Gass v. Gordon, 181 S.W. 1016 (Mo. 1915), is helpful in determining the meaning of the phrase. In that case, the Supreme Court found it necessary to define "ordinary revenue" in a statute which provided that one-third of the state's ordinary revenue should be used to support public education. The court held that ordinary revenue meant the annual and current income of the state, however derived, which is subject to appropriation for general use. That excludes all income that the constitution or statutes specifically devote to a special purpose or which is to be paid into a special fund, e.g. license fees collected on motor vehicles, etc. While ordinary revenue and general revenue are not necessarily synonymous, the terms have both been assigned the same meaning by the state Supreme Court, State ex rel. Spink v. Kemp, 283 S.W.2d 502 (Mo.Banc 1955), and by the state legislature. See Section 258.520, V.A.M.S., and Section 33.080, RSMo 1969.

The above definition makes it apparent that highway funds are not part of the general revenue fund. Article IV, Section 30(b), Constitution of the State of Missouri, provides that all state revenue derived from highway users including all state license fees and taxes on motor vehicles and motor fuels and all taxes on the privilege of manufacture, receipt, storage, distribution, sale or use of motor vehicles and fuels, shall be

Honorable Steve Vossmeier

credited to a special fund to be used for state highway purposes. Also, see Section 226.200, RSMo 1969, and Section 226.220, RSMo 1969.

Furthermore, highway funds can only be used for those purposes enumerated in Article IV, Section 30(b), Constitution of the State of Missouri, and Section 226.200, RSMo 1969. Section 226.200.2(6) authorizes the use of highway department funds for the enforcement of state vehicle laws and traffic regulations. This would be sufficient to justify the use of highway funds for most activities the Highway Patrol is engaged in. However, Section 43.180 clearly authorizes the Highway Patrol to conduct criminal investigations totally unrelated to the enforcement of vehicle laws and traffic regulations. For such activities the use of highway funds would be contrary to law.

Further support for our position can be found in Section 43.100, RSMo 1969, which provides:

"All salaries and expenses of members of the patrol and all expenditures for vehicles, equipment, arms, ammunition, supplies and salaries of subordinates and clerical force and all other expenditures for the operation and maintenance of the patrol in the enforcement of any state motor vehicle law or in the regulation of traffic on highways maintained and constructed by the state highway commission under the duties described in section 43.160 shall be paid monthly and shall be paid by the state treasurer out of the proceeds of state motor vehicle fees and license taxes and state taxes on the sale or use of motor vehicle fuels as provided in section 30 of article IV of the constitution of this state upon warrants drawn by the state auditor based upon bills of particular and vouchers certified by the officer or employee designated by the commission."

The precursor of this section, Laws, 1931, p. 20, Section 20, provided that all salaries, expenses and expenditures of the Highway Patrol should be paid out of the proceeds of state motor vehicle fees and license taxes and taxes on the sale and use of fuel. It did not contain a provision authorizing payment from the Highway Department fund only for those activities

Honorable Steve Vossmeier

related to the enforcement of motor vehicle laws or regulation of traffic. This provision first appeared in Section 43.100, RSMo 1969, enacted in 1943. It is significant that Section 43.180, RSMo 1969 (Laws, 1943, p. 656, Section 8358(a)), authorizing the Highway Patrol to make criminal investigations and authorizing payment from the general revenue fund for those investigations was first enacted in the same legislative session as Section 43.100, RSMo 1969 (Laws, 1943, p. 652, Section 8365(a)). These two sections are in pari materia and should be construed together. State ex rel. Cairo Bridge Commission v. Mitchell, 181 S.W.2d 496 (Mo.Banc 1944); Ex Parte Rody, 152 S.W.2d 657 (Mo.Banc 1941). Analyzed as a unit, it would seem apparent that the changes made by Section 43.100, RSMo, and the provisions in Section 43.180 authorizing the cost of criminal investigations to be charged to the general revenue fund were intended by the legislature to avoid any possible conflict with Article IV, Section 30(b), Missouri Constitution. It is therefore the conclusion of this office that the legislature did not intend that the cost of the Highway Patrol's criminal investigations would be charged to the Highway Department fund. It is also the conclusion of this office that the legislature intended that these expenses would be paid for from the general revenue fund.

In your second question, you ask whether highway funds can be allocated to provide for retirement benefits for members of the Highway Patrol engaged in criminal investigation. Section 226.200.2(5), RSMo, states that Highway Department funds may be used for the Highway Department's share in any retirement program for state employees, only as may be provided by law. We have found no law which authorizes the Highway Patrol to use Highway Department funds to provide retirement benefits for patrol members who are engaged in criminal investigation. It is, therefore, the conclusion of this office that highway funds may not be allocated by the Highway Patrol to provide retirement benefits for members of the patrol engaged in criminal investigation.

Therefore, it is our view that the Missouri State Highway Patrol may not use highway funds to meet the expenses of criminal investigations conducted pursuant to Section 43.180, RSMo 1969, nor can highway funds be used to provide retirement benefits for members of the Highway Patrol engaged in criminal investigation.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

STATE AUDITOR: The Land Reutilization Authority  
LAND REUTILIZATION AUTHORITY: of the City of St. Louis (Sections  
92.700-92.920, V.A.M.S.) is an of-  
fice within the "political subdivision" of the City of St. Louis, as  
the term is used in Section 29.230.2, RSMo, and, therefore, the State  
Auditor is authorized to include it within his audit of the City of  
St. Louis.

OPINION NO. 48

February 25, 1976

Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Lehr:

The following opinion is in response to your questions as follows:

- "1. Should the Land Reutilization Authority (LRA) (Sections 92.700-92.920, V.A.M.S.) of the City of St. Louis be included within the scope of the audit of the City of St. Louis petitioned pursuant to Section 29.230.2, RSMo?
- "2. If not, is the LRA a 'state agency' as defined in Section 29.200, RSMo, or a 'political subdivision' as defined in Section 29.230.2, RSMo?
- "3. If LRA is a 'political subdivision,' as defined in Section 29.230.2, RSMo, what geographical area incorporates the 'qualified voters' eligible to petition for an audit of LRA pursuant to Section 29.230.2, RSMo?"

The Land Reutilization Authority of the City of St. Louis (the Authority) is authorized by the provisions of "The Municipal Land Reutilization Law," (the Act), Sections 92.700 to 92.920, RSMo Supp. 1973, and is created by ordinance in the City of St. Louis, Ordinance No. 56054 (December 1, 1971).



Honorable George W. Lehr

The Act has been described by the Supreme Court of Missouri in Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048, 517 S.W.2d 49 (Mo. 1974) at pp. 51-52:

"MLRL establishes a procedure whereby qualifying cities can file suit to enforce tax liens in the circuit court. § 92.720. If judgment is entered in favor of the city, then the court orders the property sold by the sheriff and it fixes the time and place of the foreclosure sale. § 92.775. The land may be redeemed prior to sale by the owner or other interested party by paying the amount due. § 92.750. If at the sheriff's sale there is no bid equal to the full amount due including interest, penalties, attorney's fees and costs, the Land Reutilization Authority which is created by the statute is deemed to have bid the full amount. § 92.830. Title to any real estate which vests in the Land Reutilization Authority is held by it in trust for the tax bill owners and taxing authorities. § 92.835. The Land Reutilization Authority is created by the statute for the management, sale, transfer and other disposition of tax delinquent lands. The declared purpose is to return land which is in a nonrevenue generating nontax producing status to effective utilization in order to provide tax revenue for the city and to provide its citizens housing, new industry and jobs. § 92.875. The Authority consisting of three commissioners, § 92.885, has the duty of administering the tax delinquent lands by assuming possession and control of same and classifying the land as to its use into three classifications, to-wit: (a) suitable for private use; (b) suitable for use by a public agency; and (c) not usable in its present condition or situation and held as a public land reserve. § 92.900. The Authority is obligated to make every effort to sell the property at a price as close to its appraised value as possible, but in any event the Authority has the power, indeed

Honorable George W. Lehr

the duty, to manage, maintain, protect, rent, lease, repair, insure, alter, sell, trade, exchange or otherwise dispose of any such real estate and assemble tracts or parcels for public purposes, such as parks. § 92.900"

The court, in Collector of Revenue of the City of St. Louis, supra at p. 54, observed:

". . . A city not within a county occupies a peculiar status as it performs not only municipal functions, but also county functions. In such a city, the delinquent taxes affected by MLRL (Municipal Land Reutilization Law) are not limited to taxes for municipal purposes, but include state taxes and city taxes levied and collected for carrying out of the county functions of the city. See *Hull v. Baumann*, 345 Mo. 159, 131 S.W.2d 721, 724[3] (1939). A city within a county is not involved in the collection of taxes for state and county purposes. . . ."

and

". . . If the purpose of the act is accomplished, the state and the city in the performance of its county functions as well as in the performance of its ordinary municipal functions will all benefit."

The Act provides that the Authority serves the City of St. Louis by performing the:

". . . public purpose of returning land which is in a nonrevenue generating nontax producing status, to effective utilization in order to provide housing, new industry, and jobs for the citizens of any city operating under the provisions of sections 92.700 to 92.920 and new tax revenues for said city." (Section 92.875.2)

In addition, it is clear that the Authority performs a governmental function which supplements the Collector of Revenue's duties to the City of St. Louis and to the other taxing authorities lying, in whole or in part, within the boundaries of the City of St. Louis.

Honorable George W. Lehr

This "county function" of the Collector has been recognized judicially. State on Inf. of Barker v. Koeln, 192 S.W. 748 (Mo.Banc 1917).

In Opinion No. 98, Lehr, issued March 28, 1975 (copy enclosed), this office concluded that the State Auditor was authorized to include those public offices in the City of St. Louis performing a function comparable to a county within his audit of the "political subdivision" of the City of St. Louis.

Since the Supreme Court has held that the Authority performs a multiple function (city and county) comparable to the Collector of Revenue, it is our view that the reasoning of Opinion No. 98, 1975, is equally applicable to the Authority.

Therefore, it is our view that the State Auditor is authorized to include the Land Reutilization Authority of the City of St. Louis within his audit of the City of St. Louis because it is an office within the "political subdivision" of the City of St. Louis.

As a result, we answer your first question in the affirmative which precludes the necessity to respond to your other questions.

One further consideration is necessary. Subsection 92.900(5) states in part:

" . . . There shall be an annual audit of the affairs, accounts, expenses, and financial transactions of such land reutilization authority by certified public accountant as of December thirty-first of each year, which accountants shall be employed by the commissioners on or before November first of each year, and certified copies thereof shall be furnished to the appointing authorities described in section 92.885 and shall be available for public inspection at the offices of such appointing authorities."

The possible consideration that this provision might constitute a special law which would nullify the application of Section 29.230.2, RSMo, to the Authority, as a part of the City of St. Louis, was rejected in a comparable situation, Consolidated School District No. 1 of Jackson County v. Bond, 500 S.W.2d 18, 22 (Mo.Ct.App. at K.C. 1973).

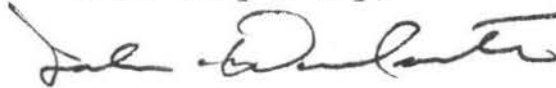
Honorable George W. Lehr

CONCLUSION

The Land Reutilization Authority of the City of St. Louis (Sections 92.700-92.920, V.A.M.S.) is an office within the "political subdivision" of the City of St. Louis, as the term is used in Section 29.230.2, RSMo, and, therefore, the State Auditor is authorized to include it within his audit of the City of St. Louis.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 98  
3-28-75, Lehr



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

May 4, 1976

OPINION LETTER NO. 49

Mr. Alfred C. Sikes  
Director, Department of Consumer  
Affairs, Regulation and Licensing  
505 Missouri Boulevard  
Jefferson City, Missouri 65101

Dear Mr. Sikes:

You have inquired of this office whether under the Omnibus Reorganization Act of 1974, 77th General Assembly, First Extraordinary Session (Laws of Missouri 1973-1974, p. 530), the Division of Professional Registration has authority to prescribe forms for license renewal notices and license renewals for the various boards and commissions assigned to the Division pursuant to the Act.

Section 4.16 of the Act provides in part:

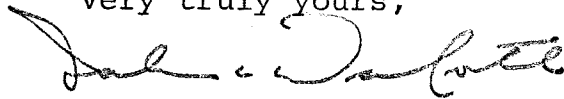
" . . . The boards and commissions assigned to the division shall exercise all their respective statutory duties and powers, except those clerical and other staff services relating to the issuance and renewal of licenses, which shall be provided by the division, within the appropriation therefor. All clerical and other staff services relating to the issuance and renewal of licenses of the individual boards are abolished. . . ." Id. at 539

Based on the foregoing, it would appear that the Division's responsibility with respect to license renewals is limited to

Mr. Alfred C. Sikes

furnishing personnel to facilitate the license renewals. Therefore, the Division of Professional Registration cannot specify the forms for license renewal notices and license renewals.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General

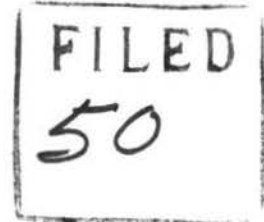
BARBERS:  
COSMETOLOGISTS:

A licensed barber may arrange, dress, curl, singe, wave, permanent wave, cleanse, cut, bleach, tint, or color hair as a normal incident of dressing hair.

OPINION NO. 50

June 3, 1976

Mr. Alfred C. Sikes, Director  
Department of Consumer Affairs,  
Regulation and Licensing  
505 Missouri Boulevard  
Jefferson City, Missouri 65101



Dear Mr. Sikes:

This is in response to your request for an opinion on the following question:

"Does the phrase '. . . cut and dress the hair . . . ' Section 328.010 RSMo 1969 include the same authorized practices as 'arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work on the hair of any person by any means. . . ' Section 329.020 RSMo 1969. . . ."

The occupation of "barber" is defined by Section 328.010 to include "cut[ting] and dress[ing] the hair." A cosmetologist pursuant to Section 329.020 is authorized to engage in, among others, the following practices: "arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work on the hair of any person." The acts relating to barbers and cosmetologists were passed at different times and there is nothing to indicate one act should be read in terms of the other. It is our view that the phrase "dress the hair" is broad enough to include any application that affects the appearance of the hair, including arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work on the hair, and may be performed by a licensed barber.

Mr. Alfred C. Sikes

However, nothing in this opinion should be construed as holding that a barber may practice under the name "cosmetologist" or that a cosmetologist may practice under the name "barber."

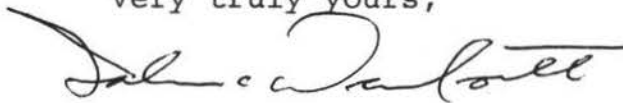
Opinion No. 85, dated April 11, 1934; Opinion Letter No. 35, dated October 9, 1961; and Opinion Letter No. 158, dated April 3, 1962 are withdrawn.

#### CONCLUSION

It is the opinion of this office that a licensed barber may arrange, dress, curl, singe, wave, permanent wave, cleanse, cut, bleach, tint, or color hair as a normal incident of dressing hair.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General





OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

February 23, 1976

OPINION LETTER NO. 51

Honorable Ron Bockenkamp  
State Representative  
Room 116B, Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Bockenkamp:

This letter is in response to your question asking:

"Whether the coroner of a second class county  
has the authority to perform an autopsy with-  
out the authorization of the next of kin?"

Authority for the coroner of a second class county to per-  
form autopsies is found in Section 58.451, RSMo Supp. 1973. When  
the conditions of that section are met the authorization of the  
next of kin is not required.

Section 194.115, RSMo, provides that the consent of certain  
persons is required to authorize an autopsy or postmortem exami-  
nation "Except when directed by a public officer or agency autho-  
rized by law to order an autopsy or postmortem examination . . . ."

In addition we refer you to our Opinion No. 37, dated  
June 26, 1953, to Harlan and Opinion No. 217, dated June 22,  
1965, to Burlison, copies enclosed, which are self-explanatory.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosures



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

April 14, 1976

OPINION LETTER NO. 52

Mr. Warren M. Black, Executive Secretary  
Public School Retirement System of Missouri  
P. O. Box 268  
Jefferson City, Missouri 65101

Dear Mr. Black:

This letter is to acknowledge receipt of your request for an opinion from this office which reads as follows:

- "1. Does the Board of Trustees of the Public School Retirement System of Missouri have authority to purchase real estate and construct a building on said real estate for the sole purpose of providing suitable office space for the present and future needs of the Retirement Systems.
- "2. Does the Board of Trustees of the Public School Retirement System of Missouri have authority to lease office space on a long term lease basis, with an option to purchase said real estate and a building on said real estate, for the sole purpose of providing suitable office space for the present and future needs of the Retirement Systems."

Subsection 1 of Section 169.020, RSMo 1969, relating to the Public School Retirement System of Missouri, provides as follows:

- "1. For the purpose of providing retirement allowances and other benefits for public school

Mr. Warren M. Black

teachers, there is hereby created and established a retirement system which shall be a body corporate, shall be under the management of a board of trustees herein described, and shall be known as 'The Public School Retirement System of Missouri'. Such system shall, by and in said name, sue and be sued, transact all of its business, invest all of its funds, and hold all of its cash, securities, and other property. . . ." (Emphasis added)

In addition, subsection 19 of Section 169.020, RSMo Supp. 1973, provides as follows:

"19. The headquarters of the retirement system shall be in Jefferson City, where suitable office space, utilities and other services and equipment necessary for the operation of the system shall be provided by the board of trustees and all costs shall be paid from funds of the system."

As indicated above, subsection 19 of Section 169.020, RSMo Supp. 1973, provides that the Board of Trustees of the Retirement System shall provide suitable office space, utilities, and other services and equipment necessary for the operation of the System and that all costs shall be paid from funds of the System. Furthermore, there is authority for the proposition that the word "property" means both "real and personal property" under Missouri law. Bianchi v. United States, 219 F.2d 182, 189 (8th Cir. 1955), cert. denied 349 U.S. 915, reh. denied 349 U.S. 969. Ludlow-Saylor Wire Co. v. Wollbrinck, 205 S.W. 196, 198 (Mo.Banc 1918). Similarly, Section 1.020, RSMo 1969, provides in part as follows:

"As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

\* \* \*

(11) 'Property' includes real and personal property;"

It should also be noted that the distinctive feature of a "lease" of property, real or personal, is that it conveys an interest in the property for a fixed or definite period of time and

Mr. Warren M. Black

is supported by consideration, Sharp v. W. & W. Trucking Company, 421 S.W.2d 213 (Mo.Banc 1967). In this regard, it has been pointed out that a provision in a lease of realty, giving the lessee an option to purchase realty at any time during the terms of the lease, was an integral part of the lease, and therefore payment of rent by the lessee constituted a sufficient consideration for the option. Cummins v. Dixon, 265 S.W.2d 386 (Mo. 1954). Lastly, it was held in Attorney General's Opinion No. 200, Lehr, 11-26-75 (copy attached), that the Missouri State Employees' Retirement System was authorized to acquire, purchase, or lease real estate for office space.

As a result of the foregoing authorities, it is our opinion that the Board of Trustees of the Public School Retirement System of Missouri has authority to purchase real estate and construct a building on said real estate or, in the alternative, to lease office space on a long term lease basis, with an option to purchase said real estate and a building on the real estate, for the sole purpose of providing suitable office space for the present and future needs of the Retirement System. It is also our opinion that the Board of Trustees should consult with the Office of Administration or the Board of Public Buildings if necessary concerning its future plans to provide suitable office space.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 200  
11-26-75, Lehr

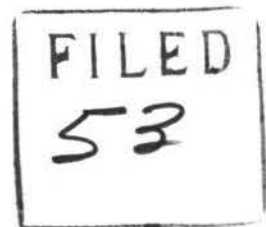
COUNTY COURT:  
COUNTY CLERK:

A county court has authority to employ secretarial, clerical, and administrative personnel, to establish a data processing department under its control, and to employ personnel to staff that department as may be indispensably necessary for the discharge of the duties of the county court in the management of county business in the absence of a statutory provision vesting the functions to be performed by such personnel in the county clerk or some other county officer.

OPINION NO. 53

April 20, 1976

Mr. Jerome E. Brant  
County Counselor, Clay County  
17 East Kansas  
Liberty, Missouri 64068



Dear Mr. Brant:

This is in response to your request for an opinion from this office as follows:

"May the County Court employ personnel, such as secretarial, clerical and administrative and establish a Data Processing Department under its control and employ personnel to staff that department?

"The County Court of Clay County, Missouri has of now employed secretarial, clerical and administrative assistants which have been hired and paid for out of federal government CETA funds. Clay County also has a Data Processing Department under the jurisdiction of the county court.

"There has been some question raised as to whether or not the county court has any authority to hire any personnel not expressly set forth in the statutes.

"Some are of the opinion that such employees should be under the office of the County Clerk.

Mr. Jerome E. Brant

"Clay County is now a first class county without a charter form of government and a county which is rapidly growing and changing from rural to urban in nature."

The question you have submitted concerns the authority of the County Court of Clay County, a first class county without a charter form of government, to employ personnel, such as secretarial, clerical and administrative, and to establish a data processing department under the control of the county court. We also understand that the duties of such personnel are routine clerical duties not now either expressly or impliedly vested by law in the county clerk or any other county officer.

Article VI, Section 7, Constitution of Missouri, provides as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

In compliance with this constitutional provision, the legislature has enacted Section 49.270, RSMo, which provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

We find no express authority for the county court to hire secretarial or clerical and administrative personnel or to establish a data processing department under its control and to employ personnel to staff that department. However, we note that the Supreme Court of Missouri in interpreting Section 49.270, above quoted, held

Mr. Jerome E. Brant

in Aslin v. Stoddard County, 106 S.W.2d 472 (Mo. 1937), that the express authority and duty of the county court under that section carries with it the necessarily implied authority to employ such labor and service as may reasonably be requisite in order to effectuate express power grants. The court concluded that the county court, therefore, had authority to employ a janitor to whom no attempt was made to delegate governmental or other such functions which involve matters of discretion to be exercised solely by the county court.

Further, we note in Rinehart v. Howell County, 153 S.W.2d 381 (Mo. 1941), the Supreme Court of Missouri held that a prosecuting attorney, even in the absence of express authority and despite the fact that other statutory provisions existed for the hiring of stenographic services for prosecutors in larger counties, was entitled to reimbursement for reasonable sums paid for necessary stenographic services incurred in the discharge of his official duties as prosecuting attorney. Notably, that case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays were bona fide, reasonable, and actual expenditures for indispensable expenses of the office by the prosecuting attorney.

The legislature has required the county clerk to keep the record of the orders, rules, and proceedings of the county court but has not required the county clerk to perform all secretarial and clerical work for the county court. See Section 51.120, RSMo. It is our view that it is within the competence of the legislature to regulate the employment of secretarial, clerical, and administrative personnel by the county court and, if the legislature so determines, to place such specific duties in the county clerk. The views we express are premised on the basis that there is no statute which purports to authorize the county clerk either expressly or by inference to perform the general secretarial, clerical, or administrative functions which the county court intends to hire personnel to perform.

We conclude from the authority cited that the county court has authority to hire personnel indispensably necessary to perform functions of the county court. Further, it should be clear that the county court does not have the power to delegate to such personnel any of the authority which is vested in it by law.

Finally, we wish to point out, with respect to the data processing and other similar equipment which is to be used by, or on behalf of, county officers, that it would be entirely impractical for the court to duplicate either the physical equipment, the maintenance or operation of the equipment for each separate county office. In this respect, the county court has the duty under Section 49.510, RSMo, of furnishing equipment, material, and the like

Mr. Jerome E. Brant

for county offices. In our view, the county court may properly discharge its duty of furnishing such sophisticated equipment as is proper and necessary for the discharge of its own duties and the duties of other county officers by following the financially sound procedure of centralizing the equipment and personnel necessary for the operation and maintenance of the equipment under the direct jurisdiction of the county court.

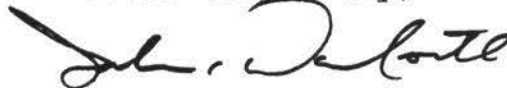
Finally, we are aware of the case of Alexander v. Stoddard County, 210 S.W.2d 107 (Mo. 1948), in which the Missouri Supreme Court held that a treasurer and ex-officio collector was not entitled to recover from the county's general revenue account an amount expended by him for the salary of a deputy hired by him. However, that case is distinguishable from the Howell County case, above, because the source of such deputy's pay was from fees and commissions earned and collected and not from general revenue.

#### CONCLUSION

Therefore, it is the opinion of this office that a county court has authority to employ secretarial, clerical, and administrative personnel, to establish a data processing department under its control, and to employ personnel to staff that department as may be indispensably necessary for the discharge of the duties of the county court in the management of county business in the absence of a statutory provision vesting the functions to be performed by such personnel in the county clerk or some other county officer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
**JEFFERSON CITY**

March 8, 1976

OPINION LETTER NO. 54

Honorable Walter L. Meyer  
State Representative  
Room 410, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Meyer:

This letter is in response to your question asking as follows:

"Are judges of the county courts in second, third, and fourth class counties entitled to the compensation provided for in Senate Bill No. 95, enacted by the Seventy-eighth General Assembly, if they refuse to participate in any, or all, of the regional councils enumerated in Senate Bill No. 95, even though their county is a member or is eligible to be a member of these councils?"

You further indicate that you have reviewed the views we expressed in our Opinion No. 213, dated October 15, 1975, to the Honorable Margaret Miller in which we stated that county court judges are entitled to the extra compensation even though they may not be actively participating in all of the councils and agencies referred to either specifically or in general in the legislation. In that opinion we cited the holding of State v. Carpenter, 388 S.W.2d 823 (Mo.Banc 1965) for the holding that an officer is entitled to the compensation provided by statute for the performance of duties by such officer even though it is impossible for him to perform such duties.

The court in the Carpenter case also held that the fact that an officer does not perform all or any of the duties of his office does not affect his right to the salary thereto unless a statute provides otherwise.

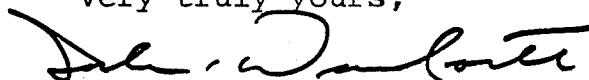
Honorable Walter L. Meyer

This latter holding in the Carpenter case cited Coleman v. Kansas City, Mo., 173 S.W.2d 572 (Mo. 1943). In the Coleman case the court held at l.c. 577:

"This is an action for salary while Murray held the office as Director of Public Works. 'In the first place this is not an action in quo warranto, against the officer himself, to forfeit his office for failure to do his duty, and in which he would be entitled to his day in court to defend his character and his record and explain whatever action he has taken, \* \* \*.' State ex rel. McGaughey v. Grayston, 349 Mo. 700, 163 S.W.2d 335, loc. cit. 340. 'Unless an office is abandoned or relinquished an officer is entitled to a trial on the charge of failing personally to devote his time to the performance of his duties. Such failure may be excusable. \* \* \* it is a willful refusal to perform the duties of an office which works a forfeiture so that a judgment of ouster is necessary.' State ex inf. McKittrick v. Wilson, Mo.Sup., 166 S.W.2d 499, loc. cit. 501."

Under these holdings, although it is our view that the statute imposes a duty upon the judges of the county court by reason of the use of the mandatory language "shall," the judges are entitled to their salaries regardless of whether or not they refuse to participate in some of the councils.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 16, 1976

OPINION LETTER NO. 55

Honorable Michael L. Shortridge  
Prosecuting Attorney  
Howell County Courthouse  
West Plains, Missouri 65775

Dear Mr. Shortridge:

This is in response to your request for an opinion from this office as follows:

"Does any conflict of interest exist when the wife of the Prosecuting Attorney in a third class county is elected to the City Council of a city within the same county?

"I am currently the Prosecuting Attorney of Howell County, Missouri, a third class county. My wife is contemplating running for election to the City Council of West Plains, the county seat of Howell County. An opinion is desired in order to forestall any possible conflict of interest claims."

Your question involves the eligibility of your wife to be a member of the city council of the City of West Plains while you are serving as prosecuting attorney of Howell County, Missouri, a third class county. We are unable to find any statute or case directly in point on this question.

Article VII, § 6, Constitution of Missouri, provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity,

Honorable Michael L. Shortridge

shall thereby forfeit his office or employment."

Clearly, this section has no application to the situation involved because it only prohibits a public officer or employee from appointing any relative in the fourth degree, by consanguinity or affinity, to public office or employment.

There is no law that requires a prosecuting attorney of a third class county to furnish legal advice to or represent such a city in his official capacity. The question does not involve the same person's holding two public offices or employment at the same time. The question is whether a husband and wife may hold different public offices or public employment at the same time without creating a conflict of interest which would render either one ineligible for such office or employment.

Section 105.490, RSMo, provides as follows:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest; nor shall he or any firm or business entity of which he is an officer, agent or member, or the owner of substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves.

"2. Any person who violates the provisions of this section shall be adjudged guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or by confinement for not more than one year, or both."

Section 105.495, RSMo, provides as follows:

"No officer or employee of an agency shall enter into any private business transaction

Honorable Michael L. Shortridge

with any person or entity that has a matter pending or to be pending upon which the officer or employee is or will be called upon to render a decision or pass judgment. If any officer or employee is already engaged in the business transaction at the time that a matter arises, he shall be disqualified from rendering any decision or passing any judgment upon the same. Any person who violates the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or confinement for not more than one year, or both."

These statutes, commonly referred to as the "Conflict of Interest Law," do not purport to prohibit the wife of a prosecuting attorney from holding the office of member of a city council in a city in the county of which he is prosecuting attorney.

Absent a prohibition in the Constitution or a statute, under the common law, a public officer is prohibited from holding two incompatible offices at the same time, the rule being founded on principles of public policy; and, even though specific constitutional and statutory provisions furnish no bar to the holding of a particular office or position at the same time, the common law must be considered in determining whether there is any incompatibility therein unless the legislature has provided such disqualification by statute. 67 C.J.S. Officers § 23.

In State ex rel. Walker v. Bus, 135 Mo. 325, 338 (Banc. 1896), the court stated:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other,

Honorable Michael L. Shortridge

is required to deal with, control, or assist him."

Here no question is presented as to the holding of two offices by one individual.

As heretofore stated, we are unable to find any constitutional provision or statute that prohibits the wife of the prosecuting attorney from serving as a member of the city council of a third class city. It is our view that the fact a wife of a prosecuting attorney of a third class county is elected as a member of the city council in a third class city does not create a conflict of interest which causes either one to be disqualified for such office or from serving in such office.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

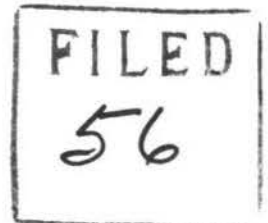
APPROPRIATIONS:

Section 23, Article IV, Constitution of Missouri, does not require that an appropriation must be stated as a specific dollar amount but only requires that the amount be capable of ascertainment; and, therefore, so-called "open-ended" appropriations, as illustrated by Sections 4.265 and 4.595 of House Bill No. 4, First Regular Session, 78th General Assembly, and Section 6.050 of House Bill No. 6, First Regular Session, 78th General Assembly, are valid. Furthermore, the practice of stating estimated amounts with "open-ended" appropriations, as illustrated by Section 4.265 of House Bill No. 4, First Regular Session, 78th General Assembly, does not constitute maximum limitations which must be adhered to.

OPINION NO. 56

March 19, 1976

Honorable James I. Spainhower  
State Treasurer  
Room 229, State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Spainhower:

This is in reply to your request for an opinion of this office concerning the validity of so-called "open-ended" appropriations to state departments and agencies.

Examples of such appropriations read as follows:

"Section 4.265. To the Office of Administration

"For apportionment to the several counties and the City of St. Louis all amounts accruing to the General Revenue Fund from the County Stock Insurance Tax

"From General Revenue (Estimate \$180,000)"  
(House Bill No. 4, First Regular Session, 78th General Assembly)

"Section 4.595. To the Department of Labor and Industrial Relations

"All moneys received from the federal government, or any agency thereof, or from any

Honorable James I. Spainhower

other source, deposited in the State Treasury for the use of the Department of Labor and Industrial Relations and the Division of Employment Security, including the operation and maintenance of a system of free public employment offices in this state in conjunction with the federal government

"From the Unemployment Compensation Administration Fund (Estimate \$60,000,000)"  
(House Bill No. 4, First Regular Session, 78th General Assembly)

"Section 6.050. To the Department of Social Services

"For the Division of Special Services

"All allotments, grants and contributions which may be received from the federal government under the provisions of the Comprehensive Employment and Training Act of 1973

"From Federal Funds"  
(House Bill No. 6, First Regular Session, 78th General Assembly)

Your question is whether such appropriations meet the requirement of Section 23, Article IV, Constitution of Missouri, as to "amount" reading in pertinent part:

". . . Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

See also State ex inf. Danforth v. Merrell, 530 S.W.2d 209 (Mo.Banc 1975); however, this case does not address the issue of what constitutes specifying an "amount," nor have we found any Missouri cases ruling on this issue.

First, we note the longstanding general practice of the legislature in appropriating to virtually every department in such manner. However, we do not have to rely on such legislative practice to presume validity (see Atkins v. State Highway Department, 201 S.W. 226, 231 (Tex.Civ.App. 1918)) for it has been held in numerous states that such appropriations are valid as to amount for the amount is capable



Honorable James I. Spainhower

of ascertainment so that the executive officers of the government are authorized to use certain money and no more for the purposes stated. It is not essential that an appropriation should be for an amount definitely ascertainable prior to the appropriation so long as the amount is ascertainable as the appropriation is carried into effect. An appropriation of all the money in a fund, or coming into a fund, is valid for such amount is definitely ascertainable. All that is necessary is that the legislature fix the extent to which the treasury will be drawn upon. See Atkins v. State Highway Department, *supra*; Scougale v. Page, 106 S.W.2d 1023, 1032 (Ark. 1937); Leonardson v. Moon, 451 P.2d 542, 550 (Idaho 1969); Cox v. Bates, 116 S.E.2d 828, 837-838 (S.C. 1960); Orbison v. Welsh, 179 N.E.2d 727, 736 (Ind. 1962); Black v. Oklahoma Funding Bond Commission, 140 P.2d 740, 745 (Okla. 1943); Riley v. Johnson, 27 P.2d 760, 763 (Calif. 1933). It is when an appropriation is made out of a general fund from which other appropriations are made and is subject to unlimited withdrawals out of the general fund that violates the requirements of specificity of amount. See McConnel v. Gallet, 6 P.2d 143 (Idaho 1931).

Thus, after comparing these cases and applying the rules set out, it is readily apparent that in each of the appropriations quoted above, specific amounts are capable of ascertainment. There is no situation where the recipient of the appropriation has discretion as to maximum amount from a general fund. Thus, the legislature has performed its duty of determining the amount to be expended for the purposes stated. It is our opinion, therefore, that such appropriations, as set out above, meet the requirement as to specificity of amount. Furthermore, see Opinion No. 24 of this office to Donnell dated July 22, 1941 (copy enclosed), reaching the same result as to a similar appropriation.

You then ask that if these so-called "open-ended" appropriations are valid, are the estimated amounts sometimes stated in "open-ended" appropriations, as illustrated in Section 4.265 of House Bill No. 4, First Regular Session, 78th General Assembly, maximum amounts that must be adhered to. We have already addressed this question in Opinion No. 213, 1974, to Christopher S. Bond (copy enclosed), in which we held the word "estimate" had no legal significance and that such estimated amounts were not limitations on the appropriations. We see no reason to change this opinion as to the appropriations quoted above. This issue is one of legislative intent; and, if estimated amounts were maximum limitations, then such would directly conflict with the clear language that all of certain moneys were appropriated. We cannot ascribe to the legislature an intent giving rise to such conflict.

Honorable James I. Spainhower

CONCLUSION

It is, therefore, the opinion of this office that Section 23, Article IV, Constitution of Missouri, does not require that an appropriation must be stated as a specific dollar amount but only requires that the amount be capable of ascertainment; and, therefore, so-called "open-ended" appropriations, as illustrated by Sections 4.265 and 4.595 of House Bill No. 4, First Regular Session, 78th General Assembly, and Section 6.050 of House Bill No. 6, First Regular Session, 78th General Assembly, are valid. Furthermore, the practice of stating estimated amounts with "open-ended" appropriations, as illustrated by Section 4.265 of House Bill No. 4, First Regular Session, 78th General Assembly, does not constitute maximum limitations which must be adhered to.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 213  
5-10-74, Bond

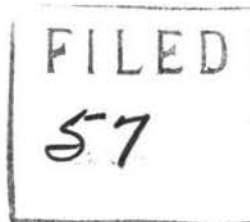
Op. No. 24  
7-22-41, Donnell

SCHOOLS: Article X, Section 11 of the Missouri  
TAXATION (SCHOOLS): Constitution does not authorize spe-  
CONSTITUTIONAL LAW: cial school districts to levy taxes  
SPECIAL SCHOOL DISTRICTS: at the rates established therein ab-  
sent legislation conferring upon spe-  
cial school districts that authority. Section 162.920, RSMo Supp.  
1973, establishes twenty-five cents per one hundred dollars assessed  
valuation as the maximum tax levy that special school districts may  
assess without voter approval. That rate may be increased with voter  
approval in the manner provided in Chapter 164, RSMo.

OPINION NO. 57

March 18, 1976

Honorable Vic Downing  
Representative, District 162  
Room 303, State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Downing:

This is in response to your request for an opinion on the fol-  
lowing question:

"Can a special school district which is au-  
thorized to set an initial tax of twenty-  
five cents on each one hundred dollars as-  
sessed valuation as provided in Section 192.  
920, V.A.M.S. increase such tax rate not to  
exceed sixty-five cents on the one hundred  
dollars valuation without voter approval?"

Whether special school districts have the authority to levy, without  
voter approval, the maximum tax rates established in Article X, Sec-  
tion 11(b) of the Missouri Constitution depends upon whether special  
school districts constitute "school districts" within the meaning of  
Article X, Section 11, and whether the legislature has authorized spe-  
cial school districts to levy taxes at the rates provided therein.

Article X, Section 11(a) of the Missouri Constitution authorizes  
political subdivisions of the state to levy taxes on property subject  
to their taxing power. Section 11(b) establishes the maximum tax rate  
that may be levied by municipalities, counties, and school districts  
without voter approval; Section 11(c) permits voters to approve tax  
rates in excess of the maximums provided in Section 11(b).

Honorable Vic Downing

In 1973, the General Assembly enacted a comprehensive statutory scheme to make special educational services for handicapped and severely handicapped children an integral part of the Missouri system of gratuitous instruction. Section 162.670, RSMo Supp. 1973; Article IX, Section 1(a), Missouri Constitution. Sections 162.815 and 162.820, RSMo Supp. 1973, authorize the creation of special school districts and the continuation of those formed under preexisting laws. Section 162.875, RSMo Supp. 1973, describes the powers of special school districts as follows:

"When the new district is organized, it shall be a body corporate and political subdivision of the state and shall be known as 'The Special District of \_\_\_\_\_' (a name selected by the governing board) and, in that name, may sue and be sued, levy and collect taxes within the limitations of the constitution of Missouri and section 162.920, issue bonds and possess the same corporate powers as six-director school districts, other than urban districts. All constitutional provisions and laws applicable to the organization and government of six-director school districts, other than urban districts, are applicable to districts organized prior to the passage of sections 162.670 to 162.995."

Based upon the foregoing constitutional and statutory provisions, it is the opinion of this office that special school districts constitute "school districts" within the meaning of Article X, Section 11 of the Missouri Constitution. The legislature has defined them as "bodies corporate and political subdivisions of the state," and has expressly granted special school districts the authority to "levy and collect taxes." Further support for this conclusion is found in Three Rivers Junior College District of Poplar Bluff v. Statler, 421 S.W.2d 235 (Mo.Banc 1967), wherein the Missouri Supreme Court held that junior college districts formed pursuant to Chapter 178 constitute "school districts" within the meaning of the Missouri Constitution.

We must next determine whether Article X, Section 11 confers constitutional authority upon school districts to levy taxes, without voter approval, at any rate up to the limits provided therein, or whether it establishes only a maximum rate that is subject to further limitation by the legislature. Section 11(b) provides, in pertinent part, as follows:

Honorable Vic Downing

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

\*                      \*                      \*

For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

This provision must be harmonized with Article X, Section 1 of the Missouri Constitution which provides as follows:

"The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes." (Emphasis added)

Missouri courts have interpreted Article X, Section 11 of the Missouri Constitution to impose a limit upon both the political subdivisions and the General Assembly by restricting the rate by which taxes can be levied without voter approval. For example, in State ex rel. Emerson v. City of Mound City, 73 S.W.2d 1017 (Mo.Banc 1934), the court stated as follows:

". . . The power to levy and collect taxes is a legislative power (61 C. J. 552 and 554) vested by the Constitution in the General Assembly, popularly called the Legislature. The state Constitution, other than vesting all legislative power in the Legislature, only limits the taxing power which the Legislature may vest in municipal corporations as branches of the sovereign governing power. Cities and like municipal corporations have no inherent power to levy and collect taxes, but derive their powers in that respect from the lawmaking power. . . . The Constitution, being the supreme law, may and does impose restrictions and limitations on this legislative power, binding alike on the Legislature, the courts, and on municipal corporations. . . .

Honorable Vic Downing

". . . [Article X, Section 11 of the Missouri Constitution] conferred upon a city no power to tax, that such power is derived 'from the acts of the General Assembly, and not directly from the constitutional provision we are considering.' . . .

"The Legislature has power to still further reduce and to restrict the rates of taxation specified as maximum rates by section 11, article 10, but not to increase same in any manner or for any purpose . . ." Id. at 1025-1026.

In another case, Brooks v. Schultz, 178 Mo. 222 (Banc 1903), the court considered an argument that Article X, Section 11 of the Missouri Constitution confers upon counties, school districts, cities, and towns the authority to levy taxes to the limits specified in the Constitution and that such authority could be exercised independent of legislation. In rejecting this argument, the court stated as follows:

"That is a misconception of that section. There is no language therein which is susceptible of the meaning that governmental power is conferred on counties, school districts, and municipal corporations independent of the Legislature. The first sentence in the section only points out the character of property subject to taxation, and lays a restriction in the matter of assessing its value. All the rest of the section is negative in form, and is, in effect, a declaration that, beyond a certain limit, taxation shall not go. The provisos, though in form permissive, are but exceptions to the restrictions which they follow." Id. at 227.

This conclusion finds additional support in Section 11(c) of Article X, which reads in part as follows:

" . . . and provided, that the rates herein fixed, and the amounts by which they may be increased may be further limited by law; . . ."  
(Emphasis added)

The above reference to "rates herein fixed" can only refer to the maximum rates established in Section 11(b). Thus, it is the opinion



Honorable Vic Downing

of this office that Article X, Section 11 of the Missouri Constitution does not authorize special school districts to levy taxes at the rate of sixty-five cents per one hundred dollars assessed valuation without voter approval.

Therefore, we must next determine whether the legislature has authorized special school districts to levy taxes at the maximum rates established in Article X, Section 11(b) of the Missouri Constitution. Section 162.920(1), RSMo Supp. 1973, provides as follows:

"The initial tax imposed on property subject to the taxing power of a special school district under article X, section 11(a) of the Constitution of Missouri shall not exceed the annual rate of twenty-five cents on each hundred dollars assessed valuation, which tax rate shall be used for the district's programs for the education and training of handicapped and severely handicapped children and for vocational education as provided by sections 162.670 to 162.995."

The foregoing provision does not authorize special school districts to levy taxes at the maximum rates provided in the Missouri Constitution; to the contrary, subsection 1 establishes a maximum rate of twenty-five cents per one hundred dollars assessed valuation.

The only remaining question is the effect of Section 162.920(2), RSMo Supp. 1973, which provides:

"Increases in the tax rate may be made with voter approval in the same manner as provided in chapter 164, RSMo, for other school districts."

As you note in your opinion request, Chapter 164 establishes the procedure by which school districts may increase tax levies beyond the maximum limits provided in Article X, Section 11(b) of the Missouri Constitution.

Political subdivisions have no inherent authority to levy taxes, and they possess only those powers explicitly granted by the Constitution or statutes. As the Missouri Supreme Court stated in State ex rel. Emerson v. City of Mound City, supra at 1025:

". . . ' . . . It [the power to tax] should never be left to implication unless it be a

Honorable Vic Downing

necessary implication. The grant relied upon must be evident and unmistakable, and all doubts will be resolved against its exercise, and in favor of the taxpayer.' . . ."

We must conclude, therefore, that reference to Chapter 164 does not authorize special school districts to levy taxes at the maximum rate provided in Article X, Section 11 of the Missouri Constitution without voter approval. Section 162.920(2), RSMo Supp. 1973, incorporates only the procedures available in Chapter 164 for increasing tax levies by popular vote.

#### CONCLUSION

It is the opinion of this office that Article X, Section 11 of the Missouri Constitution does not authorize special school districts to levy taxes at the rates established therein absent legislation conferring upon special school districts that authority. Section 162.920, RSMo Supp. 1973, establishes twenty-five cents per one hundred dollars assessed valuation as the maximum tax levy that special school districts may assess without voter approval. That rate may be increased with voter approval in the manner provided in Chapter 164, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen M. Iverson.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



STATE AUDITOR:  
CONSTITUTIONAL LAW:  
OFFICE OF ADMINISTRATION:

To the extent that the proposed financial management and control system (SAM) involves the establishing of a system of accounting

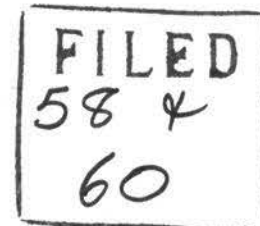
for public officials of the state of Missouri, the responsibility for designing and requiring the implementation of that accounting system rests solely with the State Auditor pursuant to the provisions of Article IV, Section 13, Missouri Constitution 1945. Those aspects of SAM not fairly included within the term "systems of accounting," as used in Article IV, Section 13, would be the responsibility of the Commissioner of Administration.

OPINION NOS. 58 and 60

October 5, 1976

Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101

Mr. J. Neil Nielsen, Commissioner  
Office of Administration  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Lehr and Mr. Nielsen:

This official opinion is in answer to your separate requests for the legal opinion of this office on the responsibility of the State Auditor under Article IV, Section 13, Missouri Constitution, with respect to the proposed financial management and control system for the state of Missouri, hereinafter referred to as "SAM."

We are advised that the Commissioner of Administration has commenced a project to design, implement, and operate a financial management and control system. The Office of Administration has completed the design of a financial management and control system for the state and anticipates that the system will be operable on July 1, 1977. We understand that SAM includes a revision of the state's central accounting system and also provides systems for departmental budgeting and systems useful in the financial management of state government. Both the State Auditor and the Commissioner of Administration believe that the design and implementation of SAM have raised questions about the relative responsibilities of the State Auditor and the Commissioner of Administration under Article IV, Section 13, and Section 29.180, RSMo 1969.

Honorable George W. Lehr  
Mr. J. Neil Nielsen

Article IV, Section 13, Missouri Constitution 1945, reads as follows:

"The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds."  
(Emphasis supplied.)

Section 29.180, RSMo 1969, also authorizes the State Auditor to establish appropriate systems of accounting for state officers and agencies:

"The state auditor in cooperation with the budget director shall establish appropriate systems of accounting for all officers and agencies of the state, including all educational and eleemosynary institutions, and he shall also prescribe systems of accounting for all county officers. Such systems of accounting shall conform to recognized principles of governmental accounting and shall be uniform in application to offices of the same grade and kind and to accounts of the same kind. Such systems of accounting shall be adequate to record all assets and revenues accrued, all liabilities and expenditures incurred, as well as all cash receipts and disbursements, and all transactions affecting the acquisition and disposition of property, including the preparation and keeping of inventories of all property. Each department shall keep such accounts in accordance with the system of accounts prescribed by the auditor."

Honorable George W. Lehr  
Mr. J. Neil Nielsen

In construing the Missouri Constitution, ". . . words are to be taken in accord with their fair intendment and their natural and ordinary meaning. . . ." Theodoro v. Department of Liquor Control, 527 S.W.2d 350, 353 (Mo.Banc 1975). Courts undertake to ascribe to the words used in the Constitution ". . . the meaning which the people understood them to have when the provision was adopted. . . ." State ex inf. Danforth v. Cason, 507 S.W.2d 405, 408 (Mo.Banc 1973). When the meaning of the Constitution is plain and unequivocal and its intention clear and unmistakable, the courts are obligated to enforce its full and exact meaning. McGrew v. Missouri Pac. Ry. Co., 132 S.W. 1076, 1088 (Mo.Banc 1910).

The words used in Article IV, Section 13, are clear and unequivocal. The State Auditor ". . . shall establish appropriate systems of accounting for all public officials of the state, . . . ."

The meaning is plain and unequivocal. "Establish" means to set up on a secure or permanent basis. The Oxford English Dictionary (Compact Edition, Oxford University Press, 1971). Therefore, we believe that the people of Missouri in adopting Article IV, Section 13, intended that their State Auditor have the responsibility of designing and requiring the implementation of appropriate systems of accounting for all public officials of the state. We find no constitutional provision granting to any other public official such authority.

In Section 29.180, the General Assembly adopted the language of Article IV, Section 13, but added language providing that the State Auditor ". . . in cooperation with the budget director shall establish appropriate systems of accounting . . . ." Certainly, it would seem advisable that the Commissioner of Administration be consulted by the State Auditor as to the design of the system of accounting which will be utilized by the Commissioner of Administration. See Chapter 33, RSMo 1969, as amended. However, the General Assembly cannot by statute infringe upon the constitutional authority of the State Auditor "to establish appropriate systems of accounting . . . ."

Therefore, that part of SAM which constitutes a revision of the State's existing central accounting system (see State of Missouri, Financial Management and Control System, Request for a Proposal, dated August 22, 1975) would be the responsibility of the State Auditor pursuant to Article IV, Section 13, and Section 29.180. Those parts of SAM involving budgeting and financial management would be the responsibility of the Commissioner of Administration.

Honorable George W. Lehr  
Mr. J. Neil Nielsen

#### CONCLUSION

Therefore, it is the conclusion of this office that to the extent that the proposed financial management and control system (SAM) involves the establishing of a system of accounting for public officials of the state of Missouri, the responsibility for designing and requiring the implementation of that accounting system rests solely with the State Auditor pursuant to the provisions of Article IV, Section 13, Missouri Constitution 1945. Those aspects of SAM not fairly included within the term "systems of accounting," as used in Article IV, Section 13, would be the responsibility of the Commissioner of Administration.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly

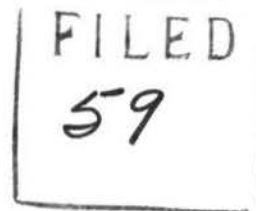
A handwritten signature in dark ink, appearing to read "John C. Danforth", written over the typed name.

JOHN C. DANFORTH  
Attorney General

March 10, 1976

OPINION LETTER NO. 59  
Answer by Letter - Klaffenbach

Honorable Norman L. Merrell  
State Senator  
Room 221, Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Merrell:

This letter is in response to your question in which you ask:

"Under Section 610.025, paragraph 2 of the Missouri Open Meetings Law, or Sunshine Law, is it permissible for a public governmental body to hold a closed meeting when someone has threatened to file suit against that public governmental body, but has yet to do so? Or must the litigation actually have been filed and on record in a court of law before a public governmental body can discuss it in closed session? In other words, do the terms 'legal actions, causes of action, or litigation,' as referred to in Section 610.025, paragraph 2, pertain only to such actions that have been filed, or could they pertain to the threat of such action?"

You have further stated that your question concerns meetings of a city council. The Section to which you refer is Subsection 2 of Section 610.025, RSMo which provides as follows:

"Any meeting, record or vote pertaining to legal actions, causes of action, or litigation involving a public governmental body, leasing, purchase or sale of real estate where public knowledge of the transaction might adversely affect the legal consideration therefor may be a closed meeting, closed record, or closed vote."



There is no doubt that the open meetings law applies to meetings of a city council because a city council is a public governmental body as defined under Section 610.010, RSMo. Further it is clear that the courts in construing a statute must give effect to the legislative intent as expressed in the statute. To this end the court is guided by certain well-established and recognized rules, among which are the following: (a) The objects sought to be obtained and the evil sought to be remedied by the legislature; (b) the legislative purpose should be assumed to be a reasonable one; (c) laws are presumed to have been passed with a view to the welfare of the community; (d) it was intended to pass an effective law, not an ineffective or insufficient one; (e) it was intended to make some change in the existing law. Cohen v. Poelker, 520 S.W.2d 50 (Mo Banc 1975).

The clear intent of the General Assembly in enacting the "Sunshine Law" was that all meetings of members of public governmental bodies except those meetings described in Section 610.025, at which the peoples' business is considered must be open to the people and not be conducted in secrecy. Id. p. 52.

The question therefore, as you have indicated, is whether the provisions of Subsection 2 quoted above relating to legal actions, causes of action or litigation involving such a body may be a closed meeting, closed record or closed vote.

In considering the language used by the legislature and giving effect to the applicable rules promulgated with respect to such interpretations by the court in Cohen v. Poelker, we note that a "cause of action" is by historical legal definition somewhat different than litigation which has already commenced. That is, a cause of action is generally defined as a right of action at law which arises from the existence of a primary right in the plaintiff and an invasion of that right by some delict on the part of the defendant, and that the facts which establish the existence of that right and that delict constitute the cause of action. Ballantine's Law Dictionary 1948 Edition, p. 197.

We conclude therefore, in order to give full effect to the legislative intent and the exception, that the legislature intended to provide that a city council may properly hold a closed meeting with respect to causes of action when the city is a potential plaintiff or defendant or otherwise involved and regardless of whether or not a legal action or litigation had already commenced.

In reaching this conclusion we take into consideration not only the particular language that is used in the exception, as we have noted, but also the fact that it is safe to assume that the legislature recognized and intended to preserve the confidentiality of council meetings relative to proposed or probable litigation without which the city and its citizens would be placed in decidedly disadvantageous positions by its adversaries.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

STATE AUDITOR:  
CONSTITUTIONAL LAW:  
OFFICE OF ADMINISTRATION:

To the extent that the proposed financial management and control system (SAM) involves the establishing of a system of accounting

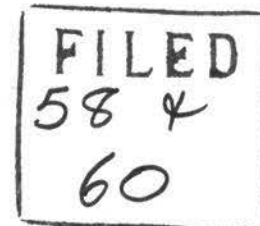
for public officials of the state of Missouri, the responsibility for designing and requiring the implementation of that accounting system rests solely with the State Auditor pursuant to the provisions of Article IV, Section 13, Missouri Constitution 1945. Those aspects of SAM not fairly included within the term "systems of accounting," as used in Article IV, Section 13, would be the responsibility of the Commissioner of Administration.

OPINION NOS. 58 and 60

October 5, 1976

Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101

Mr. J. Neil Nielsen, Commissioner  
Office of Administration  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Lehr and Mr. Nielsen:

This official opinion is in answer to your separate requests for the legal opinion of this office on the responsibility of the State Auditor under Article IV, Section 13, Missouri Constitution, with respect to the proposed financial management and control system for the state of Missouri, hereinafter referred to as "SAM."

We are advised that the Commissioner of Administration has commenced a project to design, implement, and operate a financial management and control system. The Office of Administration has completed the design of a financial management and control system for the state and anticipates that the system will be operable on July 1, 1977. We understand that SAM includes a revision of the state's central accounting system and also provides systems for departmental budgeting and systems useful in the financial management of state government. Both the State Auditor and the Commissioner of Administration believe that the design and implementation of SAM have raised questions about the relative responsibilities of the State Auditor and the Commissioner of Administration under Article IV, Section 13, and Section 29.180, RSMo 1969.



Honorable George W. Lehr  
Mr. J. Neil Nielsen

Article IV, Section 13, Missouri Constitution 1945, reads as follows:

"The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds."  
(Emphasis supplied.)

Section 29.180, RSMo 1969, also authorizes the State Auditor to establish appropriate systems of accounting for state officers and agencies:

"The state auditor in cooperation with the budget director shall establish appropriate systems of accounting for all officers and agencies of the state, including all educational and eleemosynary institutions, and he shall also prescribe systems of accounting for all county officers. Such systems of accounting shall conform to recognized principles of governmental accounting and shall be uniform in application to offices of the same grade and kind and to accounts of the same kind. Such systems of accounting shall be adequate to record all assets and revenues accrued, all liabilities and expenditures incurred, as well as all cash receipts and disbursements, and all transactions affecting the acquisition and disposition of property, including the preparation and keeping of inventories of all property. Each department shall keep such accounts in accordance with the system of accounts prescribed by the auditor."

Honorable George W. Lehr  
Mr. J. Neil Nielsen

In construing the Missouri Constitution, ". . . words are to be taken in accord with their fair intendment and their natural and ordinary meaning. . . ." Theodoro v. Department of Liquor Control, 527 S.W.2d 350, 353 (Mo.Banc 1975). Courts undertake to ascribe to the words used in the Constitution ". . . the meaning which the people understood them to have when the provision was adopted. . . ." State ex inf. Danforth v. Cason, 507 S.W.2d 405, 408 (Mo.Banc 1973). When the meaning of the Constitution is plain and unequivocal and its intention clear and unmistakable, the courts are obligated to enforce its full and exact meaning. McGrew v. Missouri Pac. Ry. Co., 132 S.W. 1076, 1088 (Mo.Banc 1910).

The words used in Article IV, Section 13, are clear and unequivocal. The State Auditor ". . . shall establish appropriate systems of accounting for all public officials of the state, . . . ."

The meaning is plain and unequivocal. "Establish" means to set up on a secure or permanent basis. The Oxford English Dictionary (Compact Edition, Oxford University Press, 1971). Therefore, we believe that the people of Missouri in adopting Article IV, Section 13, intended that their State Auditor have the responsibility of designing and requiring the implementation of appropriate systems of accounting for all public officials of the state. We find no constitutional provision granting to any other public official such authority.

In Section 29.180, the General Assembly adopted the language of Article IV, Section 13, but added language providing that the State Auditor ". . . in cooperation with the budget director shall establish appropriate systems of accounting . . . ." Certainly, it would seem advisable that the Commissioner of Administration be consulted by the State Auditor as to the design of the system of accounting which will be utilized by the Commissioner of Administration. See Chapter 33, RSMo 1969, as amended. However, the General Assembly cannot by statute infringe upon the constitutional authority of the State Auditor "to establish appropriate systems of accounting . . . ."

Therefore, that part of SAM which constitutes a revision of the State's existing central accounting system (see State of Missouri, Financial Management and Control System, Request for a Proposal, dated August 22, 1975) would be the responsibility of the State Auditor pursuant to Article IV, Section 13, and Section 29.180. Those parts of SAM involving budgeting and financial management would be the responsibility of the Commissioner of Administration.

Honorable George W. Lehr  
Mr. J. Neil Nielsen

#### CONCLUSION

Therefore, it is the conclusion of this office that to the extent that the proposed financial management and control system (SAM) involves the establishing of a system of accounting for public officials of the state of Missouri, the responsibility for designing and requiring the implementation of that accounting system rests solely with the State Auditor pursuant to the provisions of Article IV, Section 13, Missouri Constitution 1945. Those aspects of SAM not fairly included within the term "systems of accounting," as used in Article IV, Section 13, would be the responsibility of the Commissioner of Administration.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly

A handwritten signature in dark ink, appearing to read "John C. Danforth", written over the typed name.

JOHN C. DANFORTH  
Attorney General

STATE FUNDS: The State Treasurer has the authority to  
STATE TREASURER: look beyond the face of revenue transmittals to determine to what fund the monies should be credited. If the Treasurer determines that a state agency has not designated the proper fund, he may request the agency to submit a corrective revenue transmittal.

OPINION NO. 62

May 13, 1976

Honorable James I. Spainhower  
State Treasurer  
Room 229, State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Spainhower:

This is in response to your request for an opinion on the following questions:

"1. Does Missouri law impose upon the State Treasurer the responsibility or authority to look beyond the face of revenue transmittals to determine to what fund they properly should be credited?

"2. If such responsibility or authority is imposed upon the State Treasurer, what should he do if a state agency has erroneously designated the fund in which the revenues belong?

"3. If such responsibility or authority is not imposed upon the State Treasurer, what should he do if he has reason to believe that the state agency has erroneously designated the fund in which the revenues should be placed?"

Based on information you have furnished this office, the State Treasurer regularly receives "revenue transmittal" forms that are filled out in the first instance by a state official who has received funds. The official describes on the form the source and amount of the receipt and designates the account in which it should be placed. The form is then transmitted to the Director of Revenue, who in turn transmits it to the Treasurer, indicating that the sum

Honorable James I. Spainhower

has been deposited in an authorized state depository to the account of the Treasurer of Missouri.

Your first question is whether Missouri law imposes upon the State Treasurer the responsibility or authority to look beyond the face of these revenue transmittals to determine in what fund the monies properly should be placed. Stated in another manner, you ask whether the Treasurer must credit such monies to the account designated by the state official or whether he has a duty to determine whether the state official has in fact designated the proper account.

Article IV, Section 15 of the Missouri Constitution describes the duties of the State Treasurer, in pertinent part, as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. . . . No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds." (Emphasis supplied).

The Treasurer's responsibilities are further described in Section 30.240, RSMo 1969, which provides in part as follows:

"The state treasurer shall hold all state moneys, all deposits thereof, time as well as demand, and all obligations of the United States government in which such moneys are placed for the benefit of the respective funds to which they belong and disburse the same as authorized by law. . . ."

We have located no Missouri judicial authority dealing directly with your question. However, it is a cardinal rule of construction



Honorable James I. Spainhower

that every word, clause, or sentence of an enactment be given some meaning unless it is in conflict with legislative intent. Anderson v. Deering, 318 S.W.2d 383 (St.L.Ct.App. 1958). If possible, therefore, we must give meaning to the language of the foregoing constitutional and statutory provisions, which requires the Treasurer to hold or place state monies "for the benefit of the respective funds to which they belong." This language suggests that the Treasurer has some responsibility to hold or place such monies in the "proper" or "correct" fund.

We note, however, that Section 33.080, RSMo 1969, provides as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, . . . be placed in the state treasury to the credit of the particular purpose or fund for which collected, . . ."

This provision imposes upon those state officials authorized to receive monies a responsibility similar to that of the Treasurer, namely, to see to it that receipts are credited to the proper account. We assume that officials carry out this responsibility essentially by designating on the revenue transmittal form the account to which the receipts should be credited. That being the case, the question to resolve is the extent of the Treasurer's responsibility upon receipt of a revenue transmittal form that appears regular on its face. Stated in another manner, is the fund designated by the receiving official conclusive upon the Treasurer?

Although we have located no Missouri cases precisely in point, the Missouri Supreme Court considered a related issue in State ex rel. Swift v. Treasurer of State of Missouri, 41 Mo. 590 (1867). In that case, a warrant was presented to the State Treasurer for a sum representing an aggregate of the salaries of several employees of the state penitentiary, but it was payable to the warden for disbursement. Because the Treasurer believed claims against the state treasury should be paid only to the party to whom they were due, that is, to the employees themselves, he refused to sign the warrant in the form submitted to him. A mandamus action was brought to compel the Treasurer to issue the check since the warrant was duly executed, drawn against the proper fund, and appeared on its face to

Honorable James I. Spainhower

be for payment to employees of the state whose salaries were payable out of the fund against which the warrant was drawn.

The court held that the documentation submitted to authorize payment of the claim was not conclusive upon the Treasurer absent any specific provision of the law to that effect. The court concluded by stating:

"It is the province of the Treasurer to see that all warrants presented to him are drawn against the proper fund, and drawn in such manner as to make them, when paid, such vouchers as will show conclusively to whom and for what services the public moneys have been paid out by him. . . ." Id. at 593.

Accordingly, the court held the Treasurer had properly refused to issue the check.

Although this case concerned the Treasurer's responsibilities with respect only to expenditures of state monies, we see no reason why the same principle would not apply to receipts. It is our view, therefore, that a revenue transmittal form submitted to the Treasurer is not conclusive as to the fund to which the money should be credited. To assure that funds are placed in a proper account, the Treasurer may look beyond the face of revenue transmittals to determine whether the proper fund has been designated.

You next ask what the Treasurer should do if he determines a state agency has erroneously designated the fund to which monies should be credited. This question assumes that the State Treasurer has a means of making this determination. Generally, the only information submitted to the Treasurer is the revenue transmittal form on which the receiving official has described the source and amount of the receipt and has designated the fund in which it belongs. From our discussions with members of your staff, we understand that occasionally the description of the source of the receipts is inadequate to determine whether the transmitting official has designated the proper fund.

As a general rule, public officers possess not only those powers expressly granted by statute, but also such additional powers as are necessary for the due and efficient exercise of powers expressly granted. State on Inf. McKittrick v. Wymore, 132 S.W.2d 979, 987-988 (Mo.Banc 1939). A statutory grant of power carries with it everything necessary to carry out the power and make it effectual and complete. Id. at 988; Hudgins v. Mooresville Consol.

Honorable James I. Spainhower

School Dist., 278 S.W. 769 (Mo. 1925); State ex rel. Wahl v. Speer, 223 S.W. 655 (Mo.Banc 1920); Ex parte Sanford, 139 S.W. 376 (Mo.Banc 1911).

Applying these principles to your question, we conclude that the Treasurer has the implied power to do what is necessary to discharge his responsibility of seeing to it that monies are credited to the proper fund. Accordingly, in the case of an inadequate description of the source of receipts, we believe the Treasurer has the authority to request a more specific description or additional documentation that will enable him to determine whether the proper fund has been designated.

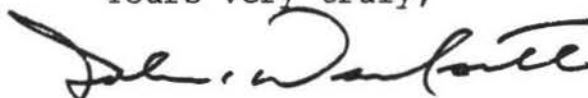
In the event the Treasurer determines that a state official has designated the wrong fund in which monies should be placed, the course to pursue will depend upon so many variables that it is impossible to determine without consideration of the particular facts involved. Your staff has advised us that recently when it has been determined that a state agency has not designated the proper fund, you have requested the agency to circulate a supplemental transmittal form debiting the initial, erroneous account and crediting the proper account. We find no basis for objecting to this procedure. However, a situation may arise in the future in which the transmitting agency, believing its initial designation to be correct, would be unwilling to make the change requested by the Treasurer. Because such a situation could result in litigation, we recommend that the Treasurer seek legal advice from the Attorney General as to the propriety of the fund designation. In view of our conclusion in response to your first and second questions, it is unnecessary to consider your third question.

#### CONCLUSION

Therefore, it is our opinion that the State Treasurer has the authority to look beyond the face of revenue transmittals to determine to what fund the monies should be credited. If the Treasurer determines that a state agency has not designated the proper fund, he may request the agency to submit a corrective revenue transmittal.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen M. Iverson.

Yours very truly,



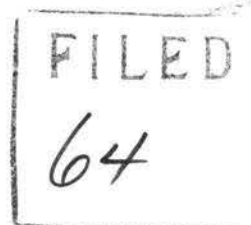
JOHN C. DANFORTH  
Attorney General



March 17, 1976

OPINION LETTER NO. 64  
Answer by letter-Klaffenbach

Honorable James N. Foley  
Prosecuting Attorney  
Macon County  
604 North Rollins  
Macon, Missouri 63552



Dear Mr. Foley:

This letter is in response to your opinion request asking as follows:

"Can a Presiding Judge of the County Court of a Third Class County file for, and if elected, hold the position of Mayor of a Fourth Class City within the same County?"

We understand your question to ask whether both offices can be held simultaneously.

You have asked that this opinion be expedited in view of the forthcoming city elections; and, therefore, we expedite this opinion consistent with your request.

We note two sections which prohibit county officers from occupying certain other offices. These sections are Section 49.140, RSMo, and Section 558.270, RSMo. Neither section prohibits the presiding judge of the county court from occupying the office of mayor of a fourth class city within the same county. However, it is not necessary that there be an express statutory prohibition since the Missouri courts recognize the common law doctrine prohibiting a public officer from holding two incompatible offices at the same time.

We considered in detail the doctrine of incompatibility of offices in our Opinion No. 2 dated March 2, 1961, to Anderson (copy

Honorable James N. Foley

enclosed). As you will note, in that opinion we quoted the authorities on the subject of incompatibility concluding generally that offices are incompatible and inconsistent when, because of the multiplicity of business in which the offices are concerned, they cannot be executed with the care and ability required or where the duties and functions are inherently inconsistent and repugnant so that one person could not discharge the duties of both offices faithfully, impartially, and efficiently. The authorities also noted that it was not an essential element of incompatibility that the clash of duty must exist in all or in the greater part of the official functions, the principal question being whether or not the holding of the two offices is contrary to the public interest.

In our view, the statutes are replete with instances where obvious conflicts would arise if the same person held the office of presiding judge of the county court and the office of mayor of a fourth class city within the same county.

We note that Sections 70.210, et seq., RSMo, permit cooperative agreements between counties and cities. Section 71.300, RSMo, authorizes cooperation in the maintenance of jails between counties and cities. Section 71.340, RSMo, authorizes cities to make certain appropriations for roads leading to and from such cities.

The sections that we have mentioned are only a few of the many statutes which exist which are indicative of conflicting areas of authority of the two offices.

We conclude that there is in fact an incompatibility and repugnancy between the office of presiding judge of the county court and of mayor of a city of the fourth class and that, as a result of such incompatibility and conflict, the same person may not hold the office of presiding judge of the county court or judge of the county court and the office of mayor of a fourth class city within the same county.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 2  
3-2-61, Anderson



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

March 18, 1976

OPINION LETTER NO. 65

Mr. James R. Spradling  
Director of Revenue  
Department of Revenue  
4th Floor, Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Mr. Spradling:

This letter is in response to your question asking as follows:

"When there is a change in the population of an incorporated city, town or village within the state of Missouri, either as a result of an increase shown by a special census or because another incorporated or unincorporated area is added to the incorporated city, town or village; or when a city, town or village either incorporates or gives up its charter of incorporation, should such changes in population or in the incorporated status of the city, town or village be reflected in the motor fuel tax funds distributed to said cities, towns and villages as provided in Article IV, section 30(a)1.(2) of the Missouri Constitution?"

You also state:

"Article IV, section 30(a)1.(2) requires that fifteen percent (15%) of the remaining proceeds of the motor fuel tax collected '... shall be allocated to the various incorporated cities, towns and villages within the state having a population of more than two hundred according to the last preceding

Mr. James R. Spradling

federal decennial census,.....' Some cities have had special censuses which indicate that their population has increased and the question has arisen whether or not their fuel tax collections should increase. There have also been decreases in population, abolition of cities and increases in population as a result of merger and annexation. The director needs to know whether any of these changes should be reflected in the motor fuel tax payments."

Section 30(a) of Article IV of the Missouri Constitution states in pertinent part:

"Fifteen per cent of the remaining net proceeds shall be allocated to the various incorporated cities, towns and villages within the state having a population of more than two hundred according to the last preceding federal decennial census, solely for construction, reconstruction, maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes, and the use thereof being subject to such other provisions and restrictions as provided by law. The amount apportionable to each city, town or village shall be based on the ratio that the population of the city, town or village bears to the population of all incorporated cities, towns or villages in the state having a like population, as shown by the last federal decennial census, provided that any city, town or village which had a motor fuel tax prior to the adoption of this section shall annually receive not less than an amount equal to the net revenue derived therefrom in the year 1960; and"

You will note that the section we have quoted above refers in two places to the last preceding federal decennial census.

We find no provision in this section of the Constitution or elsewhere in the Missouri Constitution for the use of a special census instead of a decennial census.

Mr. James R. Spradling

We are aware that Sections 71.160, et seq., RSMo, provide for the taking of a special census by a city. Section 71.170, RSMo, expressly provides that a census taken pursuant to such sections:

" . . . shall be the legal census and population of such city or town, for all purposes whatsoever, under the constitution and laws of the state."

To our knowledge, this latter provision has not been construed by the Missouri courts. However, it is our view that inasmuch as the legislature does not have the authority to amend the Constitution by statute, such provision is of no effect insofar as the constitutional provisions are concerned which require that the census be by decennial census.

Therefore, we conclude that the census referred to under Section 30(a) of Article IV is the last federal decennial census and that a special census taken under the state statutes cannot be substituted for a federal decennial census.

On the other hand, it is possible where areas have been joined by reason of annexation to determine the population of such areas as of the last federal decennial census. We considered this problem in our Opinion No. 407 dated December 10, 1964, to Yocom (copy enclosed), which is self-explanatory. If the population of the areas which are joined together by reason of such annexation can be appropriately determined by the Bureau of Census in Washington, D.C., as to the number of inhabitants living within the combined areas as of the date of the last federal decennial census, such combined total population can be used for the purposes of the distribution of the 15% of the remaining proceeds of the motor fuel tax collected.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op.Ltr.No. 407  
12-10-64, Yocom



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 18, 1976

OPINION LETTER NO. 67

Honorable Steve Gardner  
Representative, District 92  
c/o House Post Office  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Gardner:

This letter is in response to your question in which you ask:

"Whether an individual may run for Police Judge in the City of Pacific at age 18. There is no city ordinance relating to this question. There is a question whether state laws require a candidate to be 18 or 21."

We understand from the office of the city clerk of Pacific, Missouri, that that city is located in both Franklin County and St. Louis County. St. Louis County is a first class county with a charter form of government. Under Section 98.500, RSMo, a municipal judge of a city of the fourth class, which is located in a county of the first class with a charter form of government, is required to be licensed to practice law as an attorney in this state except that any person holding the office of police judge in such city on October 13, 1969, is eligible for the office of police judge without being licensed to practice law. The same section also provides that the mayor and board of aldermen of cities of the fourth class not in a county of the first class with a charter form of government may, by ordinance, provide for the election of police judges in such cities who shall be elected at the regular city elections. Therefore, if Pacific, Missouri, was not in a county of the first class having a charter form of government, a person who is 18 years of age and otherwise qualified would be qualified to serve as police judge. That is, under Section 79.250, RSMo, all officers elected to such a city are required to be qualified voters. A qualified voter is necessarily a "registered voter."

Honorable Steve Gardner

State ex rel. Socialist Workers' Party of Missouri v. Kirkpatrick, 513 S.W.2d 346 (Mo.Banc 1974). And, under the 26th Amendment of the United States Constitution and under Article VIII, Section 2 of the Missouri Constitution, the legal age of voters is 18 years. See Totton v. Murdock, 482 S.W.2d 65 (Mo.Banc 1972).

However, since Pacific, Missouri, is located in St. Louis County as well as Franklin County and since St. Louis County is a county of the first class with a charter form of government, the provision of that section requiring such municipal judge to be an attorney prevails. Under Supreme Court Rule 8.05, a person cannot be admitted to the Bar of this state if he is not at least 21 years of age.

We therefore conclude that the municipal judge of Pacific, Missouri, must be an attorney at law except that a person holding the office of police judge on October 13, 1969, is eligible for such office even though he or she is not a lawyer.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

March 29, 1976

OPINION LETTER NO. 68

Honorable Al Nilges  
State Representative, District 126  
Room 413, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Nilges:

This letter is in response to your question asking:

"Whether or not a nurse can also hold a  
funeral director's license and be a co-owner  
of a funeral home in the same local area.  
Would this be a conflict of interest?"

You also state that you refer to a particular situation in  
which it has been alleged that the nurse you described is a co-  
owner of a funeral business and has a funeral director's license.

A nurse is, of course, not a public officer and therefore  
irrespective of whether or not there may be any impropriety in  
her actions, there is no conflict of interest within our conflict  
of interest laws or the historical concept of official conflicts  
of interest.

Whether or not there is any unprofessional or prohibited  
conflict under the Nurses Practicing Act, Chapter 335, RSMo, or  
under the provisions relative to Embalmers-Funeral Directors,  
Chapter 333, RSMo, depends upon the precise situation.

We cannot purport to determine what the actual facts are  
involved in the situation that you briefly describe. We suggest,  
however, that if any complaint is to be made with respect to  
unprofessional conduct on the part of the person holding the



Honorable Al Nilges

nurse's license, we presume as a registered nurse, then such complaints should be made to the State Board of Nursing which is located at 3523 North Ten Mile Drive, Jefferson City, Missouri.

Similarly, inasmuch as you indicate that this individual holds a funeral director's license, complaints concerning her function as a funeral director may be addressed to the Board of Embalmers and Funeral Directors, Canton, Missouri.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

PERMITS:

STATE PROPERTY:

AIR CONSERVATION:

SOVEREIGN IMMUNITY:

DEPARTMENT OF NATURAL RESOURCES:

A city or county which holds a certificate of authority granted by the Missouri Air Conservation Commission pursuant to Section 203.140, RSMo Supp. 1973, may require that a permit or other ap-

proval be obtained from such city or county before a state agency may construct an air contaminant source within the boundaries of that city or county.

OPINION NO. 69

April 15, 1976

Mr. James L. Wilson, Director  
Department of Natural Resources  
P. O. Box 176  
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This opinion is in response to your request that we answer the following question:

- "1. May a city or county which holds a certificate of authority granted by the Missouri Air Conservation Commission pursuant to Section 203.140, RSMo Supp. 1973, require that a permit or other approval be obtained from such city or county before the State may construct an air contaminant source within the boundaries of that city or county?"

We understand that the specific factual situation which prompted your request is the construction at the St. Louis State Hospital, a state-owned facility, of a new boiler and attendant equipment which will be used for generation of heat and power for the hospital. The operation of this boiler will result in the emission of certain gases and particulate matter which fall within the definition of "air contaminant" found in Section 203.020, RSMo Supp. 1973.

The City of St. Louis was granted a certificate of authority by the Missouri Air Conservation Commission, pursuant to Section 203.140, RSMo Supp. 1973. Under the certificate, the city may

Mr. James L. Wilson

operate its own permit system for air contaminant sources. Section 203.140. Your question is whether the city's permit system can be enforced against (applied to) state property which is used in such a way that air contaminants are emitted therefrom.

We initially note that the city's air pollution ordinances do not speak in terms of air contaminant sources, as does Section 203.075, the state permit requirement. However, Ordinance No. 50163, Section 18, requires a permit before constructing or altering any fuel-burning plants or devices or chimneys connected therewith. We understand the boiler in question at the St. Louis State Hospital to be such a fuel-burning plant.

The answer to your question basically involves a determination whether the state has waived its sovereign immunity with respect to a state hospital which constructs an air contaminant source within the city. Section 203.075 provides that:

"1. It shall be unlawful for any person to commence construction of any air contaminant source in this state after August 13, 1972, without a permit therefor, . . ."

Section 203.020(13) defines "person" to include any "agency, board or bureau" of the state government. We conclude from the language of Section 203.075 and from the definition of person, that the legislature intended that state agencies would have to obtain permits before constructing air contaminant sources. The essential question is whether the legislature also intended, by Section 203.140, to subject state facilities to the city's permit process.

As a general rule, the state, in the ownership of its property, is not subject to a local ordinance unless the state waives its right to regulate its property. Paulus v. City of St. Louis, 446 S.W.2d 144 (St.L.Ct.App. 1969). In that case the court held that the city could not require the state (through its contractor) to obtain a building permit prior to constructing part of the St. Louis State Hospital. However, the court in Paulus recognized that a city could impose its regulatory ordinances on state property if the state so agreed.

We are also aware that statutes waiving the state's sovereign immunity will be strictly construed. Cf. Gas Service Company v. Morris, 353 S.W.2d 645 (Mo. 1962). However, in seeking legislative intent, we should ascribe to the statutory language its plain and rational meaning. Id. We believe that the language of Section 203.140, taken with the requirement under Section 203.075 that

Mr. James L. Wilson

state-owned air contaminant sources obtain a permit, requires the conclusion that the legislature intended that state-owned facilities in a city holding a certificate of authority be subject to such city's permit requirements.

Section 203.140 provides that any charter city or county and any first or second class city or county may apply to the Commission for a certificate of authority to operate its own permit procedure within its boundaries. Section 203.140 goes on to provide that the city or county may issue permits, subject to the requirements of Sections 203.075 and others, and also subject to the rules and regulations of the Commission. Section 203.140 further provides that a permit issued by a city or county holding a certificate of authority shall serve as a permit granted by the Commission.

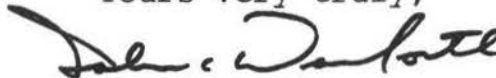
A fair reading of Section 203.140 leads us to conclude that the legislature intended that a city or county holding a certificate of authority could operate a permit system substantially equivalent to the permit system required by Section 203.075. As state agencies are required to obtain permits under the latter section, we believe the legislature intended, where a state agency constructs an air contaminant source located within a city or county holding a certificate of authority, that the agency obtain a permit from such city or county. We believe that such intention, as expressed in Section 203.140, constitutes a limited waiver of sovereign immunity of the state.

#### CONCLUSION

It is the opinion of this office that a city or county which holds a certificate of authority granted by the Missouri Air Conservation Commission pursuant to Section 203.140, RSMo Supp. 1973, may require that a permit or other approval be obtained from such city or county before a state agency may construct an air contaminant source within the boundaries of that city or county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Dan Summers.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 29, 1976

OPINION LETTER NO. 71

Honorable John T. Russell  
State Representative, District 150  
Room 202, State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Russell:

This letter is in response to your opinion request in which you have asked as follows:

"In a Special Election to annex additional territory into a Special Road District who is eligible to vote? Are all registered voters of the proposed district eligible to vote or only those registered voters in the area to be annexed? See Section 233.155."

Section 233.155, RSMo, to which you refer, provides in full as follows:

"1. Whenever the inhabitants of any special road district already formed under sections 233.010 to 233.165 shall desire to extend the boundaries of such district to take in territory not included in the original district, and shall present a petition to the county court of the county in which such district is located, or if the proposed district is to include portions of more than one county, then to the county courts of each of such counties, signed by not less than thirty-five resident property owners in the old district and not less than fifty per cent of the

Honorable John T. Russell

resident property owners in the territory proposed to be taken into said district, asking the county court or courts of such county or counties to submit the proposition of the proposed extension of such road district to a vote of the people of such proposed district on a day to be named in such petition for their adoption or rejection, the county court of such county, or if the proposed district shall include parts of more than one county, the county courts of all such counties, shall each make an order of record that the proposed extension of said road district under the provisions of this section, describing the same by its title and the date of its approval, and describing the boundaries of the district as proposed to be extended, be submitted to the voters of such proposed road district on the date stated in the petition, at the next general election, if such date falls on a general election; if not, then at a special election to be held for that purpose at such time specified in said petition.

"2. Each county court shall give notice of such election by publishing the same in some newspaper published in its county. Such notice shall be published for not less than two consecutive weeks, the last insertion to be within five days next before such election, and such other notice may be given as the court or courts may think proper.

"3. The said county court or county courts of each of said counties shall have the ballots for the election in their counties printed, and shall have printed upon such ballots: 'For the extension of the special road district,' 'Against the extension of the special road district.' 'Erase the clause you do not favor.'

"4. If the territory of more than one county be included in said special road district, the county court of each county in said district shall, as soon as the returns are in from said election, cause a certificate to be made out stating the number of votes cast for

and against said proposition in said county, and cause such certificate to be filed with the county clerk of the county court of every other county which shall form a part of said special road district. If it shall appear from the returns of said county and from said certificate that a majority of the votes cast upon the proposition in the whole proposed district be in favor of the extension of said road district, the county court or county courts in said proposed district shall declare the result of the vote thereon in said proposed district by an order of record, and shall make an order of record that the above specified road district laws shall extend to and be the law in such special road district, including the extension thereof, setting out the boundaries of said district as extended, the same to take effect and be in force from and after a day to be named in such order, said day to be not more than twenty days after said election.

"5. In case any special election shall be held for the purpose of extending any special road district, the county court of each county which shall form a part of such proposed district shall appoint three judges of election for each voting precinct in such proposed special road district in their respective counties, one of whom shall be the clerk of the election, which judges and clerks shall subscribe and take the oath required of judges and clerks of election.

"6. Except as herein provided, said election shall be governed by the laws of the state of Missouri for the election of county and state officers; provided, that a failure to comply with the registration laws shall not affect or invalidate said election.

"7. If any territory added to any such original district be in any county outside of the county of such original district, each county outside of such original district may appoint one road commissioner to act with the

Honorable John T. Russell

commissioners appointed in the county of the original district. Such commissioners so appointed outside of the county of the original district shall serve for a term of three years from the date of such appointment, and until their successors shall be appointed and qualified. Such commissioners shall be resident taxpayers of such added territory in such county of their appointment. Except as herein provided, such commissioners shall be governed by sections 233.010 to 233.165. No change shall be made in the number of commissioners appointed by the county of the original district or in the manner of their appointment.

"8. Each county shall pay the election expenses made in such county. If a majority of the votes of the proposed district, as extended, be cast in favor of such extension, then the territory of such district, as extended, shall be governed by sections 233.010 to 233.165. But if such extension proposition shall not receive a majority of the votes of said district, as extended, then said special road district shall remain as it was before said petition was filed. Any special road district extended under the provisions of this section may be extended so that after such extension it shall not be more than seventeen miles square." (Emphasis added).

As can readily be seen from the above quotation, the statute refers to a vote of the people of such proposed district as extended. This then means, in our view, a vote of the people presently included within the district as well as those voters who are located within the territory sought to be annexed.

Very truly yours,



JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

May 25, 1976

OPINION LETTER NO. 74

Mr. J. Neil Nielsen, Commissioner  
Office of Administration  
Room 125, State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Nielsen:

This letter is in response to your request for an opinion concerning the proper taxation of jury fees in criminal cases. This question was addressed by an Attorney General's opinion which issued under Thomas Eagleton's signature in 1963 (Opinion No. 5, 1963). In that opinion, this office ruled that a county

"... is not authorized to tax as part of the costs in a criminal case the compensation payable under Sections 494.100, 494.110 and 494.120 to the jurors who serve or who are summoned in connection with such case. However, the fees of all others jurors, not members of the regular panel, who are summoned for a particular case, but do not serve therein, and whose compensation is not provided for otherwise than by Section 494.170, are to be taxed as costs."

In other words, the only circumstances under which jury fees may be taxed as costs are those which are set out in Section 494.170, RSMo. That statutory section reads as follows:

"1. Except as otherwise provided by law jurors shall be allowed fees for their services as follows:

Mr. J. Neil Nielsen

For each juror attending a view or  
execution of a writ of ad quod  
damnum, per day ..... \$1.00  
For each juror attending a coroner's  
inquest, per day ..... 3.00  
For each person summoned, attending  
and reporting to any court of rec-  
ord, per day ..... 3.00  
For each mile traveled in going to  
and returning from the place of  
the trial in attending any trial  
before a court of record, per  
mile ..... .07

"2. All fees allowed jurors as above shall  
be taxed as costs in the cases, respectively,  
in which they were summoned; but jurors serv-  
ing in more than one case on the same day, at  
the same place, shall be allowed fees only in  
one case; and any juror, who claims fees for  
attending in two or more cases on the same day,  
at the same place, shall not be allowed fees  
for that day."

A copy of the 1963 opinion is enclosed. We note no subsequent  
statutory amendments or decisions which would render that opinion  
invalid.<sup>1</sup>

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 5  
1-4-63, Anderson

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<sup>1</sup>A contrary court of appeals decision was reversed by the Su-  
preme Court, albeit on other grounds. State v. Norman, 371 S.W.2d  
41 (St.L.Ct.App. 1963), rev'd on other grounds, 380 S.W.2d 406 (Mo.  
Banc 1964).



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

June 28, 1976

OPINION LETTER NO. 74A

Mr. J. Neil Nielsen  
Commissioner  
Office of Administration  
Room 125, State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Nielsen:

This letter is in response to your request for an official opinion on the following question:

"(1) Section 552.080, (1973 Supp.) provides for taxation of psychiatrist fees as costs in a criminal case. Section 552.080(1) states that these expenses shall be paid by the county, and Section 552.080(2) provides for the reimbursement of the county by the state. When is the state required to reimburse the county? Does such liability extend to the cost of commitment after acquittal?"

Section 552.080 directs the county to pay the taxed "[e]xpenses and fees for examinations, reports and expert testimony of physicians appointed by [a] court to examine the accused under Section 552.020 and 552.030, or as designated by the superintendent of a facility for the division of mental diseases to make such examination."<sup>1</sup>

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<sup>1</sup>Section 552.020 provides for the examination of criminal defendants to determine their fitness to stand trial. Section 552.020(7) provides for the commitment of defendants to mental hospitals pending institution of criminal proceedings. Section 552.030(4) provides for examination of defendants who plead mental disease or defect.

Mr. J. Neil Nielsen

Section 552.080 also directs the county to pay "expenses of the care and treatment in a state mental institution of any accused or defendant transferred under the provisions of Section 552.040 or 552.050."<sup>2</sup>

Section 552.080(2) provides for the reimbursement of the county when the state or defendant is liable for costs under the provisions of Chapter 550.

Section 550.020(1), (1969 Supp.) reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant."

Section 550.040 reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

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<sup>2</sup>Section 552.040 provides for the commitment of defendants acquitted by reason of mental disease or defect. Section 552.050 provides for transfer to a state mental hospital when the person in charge of any correctional institution believes that an inmate needs the custody, care and treatment which can only be provided by a mental hospital.

Mr. J. Neil Nielsen

These two statutory sections set out the only circumstances under which the state is charged with the payment of costs in criminal cases. Note the following:

(1) It is clear that the state is not required to reimburse the county for the cost of mental examination or treatment until the case has been finally determined. Thus, where a defendant has been determined unfit to stand trial pursuant to Section 552.020 and has been committed to a mental institution pending trial, the state is not required to reimburse the county for the cost of such commitment until the case has been finally determined.

(2) If a defendant is convicted and is indigent, the state shall be required to reimburse the county for the cost of mental examination if the crime for which the defendant is convicted is one of the offenses enumerated in Section 550.020(1).

(3) If a defendant is acquitted, the state is required to reimburse the county for the costs of psychiatric examinations if the crime is one for which the state would be required to pay costs generally under Section 550.040. If the defendant is acquitted on grounds of mental disease or defect and the crime is one for which the state is required to pay costs under Section 550.040, the state's liability extends to the cost of commitment. This was the holding of the Court of Appeals, Kansas City District, in the recent case of Robb v. Estate of Brown, 518 S.W.2d 729 (Mo.Ct.App. at K.C. 1974), transfer denied (March 10, 1975).

Note that in all situations the initial burden of paying these costs is to be borne by the county--the state's responsibility is limited to reimbursing the county where costs would ultimately be taxable against the state under Chapter 550.

Your next question is:

"(2) Section 552.080 (1973 Supp.) allows the expense of conveying a prisoner to or from a correctional institution to a state mental hospital to be paid by

Mr. J. Neil Nielsen

the state. By the terms of this section or Section 57.290, Sub-section 5, may the state be taxed for the cost of transporting a defendant between a county jail and a state mental hospital?"

Although Section 552.080 allows the expense of conveying a prisoner to or from a correctional institution to be paid by the state, it is incorrect to assume that the term "correctional institution" embraces a county jail. The use of the term in the context of Chapter 552 implies a narrower definition. Reference may be made to Section 552.050.1, RSMo Supp. 1975. There the law provides: "If the person in charge of any correctional institution has reasonable cause to believe that any inmate needs care in a mental hospital, he shall so certify to the division of classification and assignment . . . ." The division of classification and assignment, of course, is part of the state penal system. A similar directive appears at Section 552.050.2. Hence, if the state is to be required to pay the cost of transporting prisoners to and from county jails, the mandate must be found elsewhere than in Section 552.080.

Section 57.290.5, in relevant part, reads as follows:

"The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safekeeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, [certain prescribed compensation]. . . ."

Section 57.290.6, provides that "[t]hese costs shall be taxed as other costs in criminal procedure immediately after conviction of any defendant in any criminal procedure."

By the terms of this section, when a defendant is transported between a county jail and a mental hospital

Mr. J. Neil Nielsen

for purposes of pre-trial examinations--and is later convicted--the costs of transportation may be taxed. However, we find no provision for taxation of transportation costs when the defendant is acquitted and released--or when the defendant is acquitted on grounds of mental disease or defect and is committed to a mental hospital. Note that the statute only provides for taxation of these costs "after conviction."

Your next question is:

"(3) How many days for boarding of a prisoner after the completion of a case are considered part of the case proper and chargeable against the state by the City of St. Louis and all other counties?"

In a 1962 letter opinion to Charles Trigg, former Attorney General Eagleton observed that "the state is obligated to reimburse the City of St. Louis for the feeding expenses of prisoners, etc., up to a maximum of thirty days." Attorney General Eagleton's opinion was based on Section 57.290, RSMo 1959, which provided, in relevant part, that "[i]n cities having a population of two hundred thousand inhabitants or more, convicts shall be taken to the penitentiary not oftener than twice in any one month." In 1975, Section 57.290 was amended to read--again, in relevant part--that "[i]n cities having a population of two hundred thousand inhabitants or more, convicts shall be taken to the penitentiary as often as the sheriff deems necessary." The law further provides that "all persons, convicted and sentenced to imprisonment in the penitentiary at any term or setting of the court, shall be taken to the penitentiary at the same time, unless prevented by sickness or unavoidable accident."

Section 57.290 should be read in conjunction with Section 546.610 (1975 Supp.), which provides as follows;

"Where any convict shall be committed to the division of corrections the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general

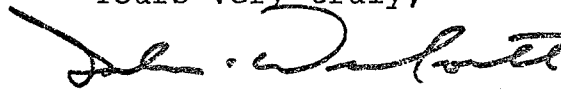
Mr. J. Neil Nielsen

and usual deputy, cause such convict to be transported to a place designated by the director of the division of corrections and delivered to the keeper thereof."  
[Emphasis supplied.]

No time limit is provided for in either statutory section. For this reason, a reasonable time period may be presumed to have been intended by the legislature.

Since there have been significant amendments to the statute upon which the 1962 opinion was based, that letter opinion is hereby withdrawn.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



November 23, 1976

OPINION LETTER NO. 75  
Answer by letter-McBride

Mr. J. Neil Nielsen, Commissioner  
Office of Administration  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Nielsen:

This is in response to your request for an opinion of this office asking several questions about workmen's compensation insurance for state employees.

I

Your first question reads as follows:

Are the following state agencies or departments required by law to be self-insured for workmen's compensation purposes: Department of Mental Health, Division of Corrections, Division of Youth Services, Division of Probation and Parole, Federal Soldier's Home at St. James, and the National Guard on emergency duty?

Section 202.024, RSMo 1969, provides that the Division of Mental Health shall come under the Workmen's Compensation Law and that the state of Missouri shall be a self-insurer in workmen's compensation for the employees of the Division of Mental Health without insurance. In the Omnibus State Reorganization Act of 1974 (hereinafter referred to as Reorganization Act), the Division of Mental Health was transferred by type I to the Department of Mental Health. Section 9.3, Appendix B, RSMo Supp. 1975. Accordingly, Section 202.024 now applies to the Department of Mental Health and requires that the state of Missouri shall be a self-insurer in workmen's compensation for employees of the department without insurance.

Mr. J. Neil Nielsen

Section 216.183(1), RSMo 1969, provides that the Department of Corrections shall come under the Workmen's Compensation Law and that the state of Missouri shall be a self-insurer for the employees of the department without insurance. In the Reorganization Act, the Department of Corrections was transferred by type II to the Department of Social Services and became the Division of Corrections within said department. Accordingly, Section 216.183 now applies to the Division of Corrections and requires that the state of Missouri shall be a self-insurer in workmen's compensation for employees of the division without insurance.

Section 219.030, RSMo 1969, assigned the State Board of Training Schools to the Division of Educational Institutions in the Department of Corrections; and Section 216.183(2), RSMo 1969, by granting authority to the Director of the State Board of Training Schools, along with others, to perform duties incidental to carrying out the purposes of this section, shows the intention of the legislature to include employees of the State Board of Training Schools as employees of the Department of Corrections for workmen's compensation purposes as set out in the first paragraph of this section. In the Reorganization Act, the State Board of Training Schools was transferred by type I to the Department of Social Services and became the Division of Youth Services within said department. Accordingly, Section 216.183 now applies to the Division of Youth Services and requires that the state of Missouri shall be a self-insurer in workmen's compensation for employees of the division without insurance.

Section 549.300, RSMo 1969, makes the Board of Probation and Parole a division of the Department of Corrections; and Section 216.183(2), RSMo 1969, by granting authority to the chairman of the Board of Probation and Parole, along with others, to perform duties incidental to carrying out the purposes of this section, shows the intention of the legislature to include employees of the Board of Probation and Parole as employees of the Department of Corrections for workmen's compensation purposes as set out in the first paragraph of this section. In the Reorganization Act, the Board of Probation and Parole was transferred by type II to the Department of Social Services. Accordingly, Section 216.183 now applies to the Board of Probation and Parole and requires that the board shall come under the Workmen's Compensation Act and that the state of Missouri shall be a self-insurer in workmen's compensation for employees of the board without insurance.

Your first question did not include the Division of Family Services. I presume that division was omitted through inadvertence as it is included in the statement of facts giving rise to the questions. Section 207.070, RSMo 1969, provides that the

Mr. J. Neil Nielsen

Division of Welfare of the Department of Public Health and Welfare shall come under the Workmen's Compensation Law and that the state of Missouri shall be a self-insurer for the employees of the division without insurance. In the Reorganization Act, the Division of Welfare was transferred by type I to the Department of Social Services and became the Division of Family Services within said department. Accordingly, Section 207.070 now applies to the Division of Family Services and requires that the state of Missouri shall be a self-insurer in workmen's compensation for employees of the division without insurance.

Section 207.010, RSMo 1969, provides that the Board of Trustees of the Federal Soldiers' Home and the home shall be a part of the Division of Welfare. Therefore, the employees of the Federal Soldiers' Home are included as employees of the Division of Welfare for workmen's compensation purposes as set out in Section 207.070, RSMo 1969. In the Reorganization Act, the Federal Soldiers' Home was transferred by type I to the Division of Veterans Affairs, then created, in the Department of Social Services. Accordingly, Section 207.070 now applies to the Federal Soldiers' Home and requires that the state of Missouri shall be a self-insurer in workmen's compensation for employees of the home without insurance.

As to the National Guard, Section 41.900, RSMo 1969, places members of the Missouri Organized Militia under workmen's compensation when ordered to active state duty by the Governor and gives the state of Missouri the option to become a self-insurer or to purchase insurance; and Section 41.910, RSMo 1969, gives the Adjutant General the right to exercise the option. In 1967, the Adjutant General elected to self-insure.

The question then remains as to what effect Sections 105.810, 105.820, and 105.830, RSMo 1969, have on the requirements for self-insurance for employees of the Department of Mental Health, Division of Corrections, Division of Youth Services, Division of Probation and Parole, Division of Family Services, and the Federal Soldiers' Home and in the option of the Adjutant General to self-insure or purchase insurance for members of the National Guard when ordered to active state duty by the Governor. Enclosed is a copy of Opinion No. 72 dated February 23, 1971, to the Honorable Edna Eads, answering this question as it relates to the Division of Mental Health prior to the Reorganization Act. This opinion is still applicable to the Department of Mental Health, and the reasoning of the opinion is also applicable to the Division of Corrections, Division of Youth Services, Division of Probation and Parole, Division of Family Services, and the Federal Soldiers' Home. The opinion also applies to members

Mr. J. Neil Nielsen

of the Missouri Organized Militia when ordered to active state duty by the Governor since the Adjutant General, in 1967, exercised the statutory option and elected to self-insure under the provisions of Section 41.900, RSMo 1969. Sections 105.800 through 105.830 would not affect the Adjutant General's right to exercise the option to self-insure or purchase insurance.

## II

Your second question reads as follows:

"Has the passage and effects of the 'Omnibus State Reorganization Act of 1974', (C.C.S.H.C. S.S.C.S. for S.B. No. 1, 77th General Assembly, 1st ExtraOrdinary Session) changed the statutory requirement of the above agencies to be self-insured?"

We believe that we have answered this question in our answer to question number one.

## III

Your third question reads as follows:

"Can those state agencies which are required by law to be self-insured, self-insure their workmen's compensation liability to a certain limit and then purchase excess coverage through a private insurance carrier to pay the liability beyond the self-insured limit established?"

The requirement in each of Sections 202.024, 216.183, and 207.070, RSMo 1969, that the state of Missouri shall be a self-insurer and assume all liability imposed by Chapter 287, RSMo, in respect to personnel of the division to which the section pertains, precludes any such limitation on liability of the state as a self-insurer, and we find no authority for the state to purchase insurance to cover any part of this liability. Therefore, our answer to this question is in the negative.

## IV

Your fourth question reads as follows:

"May departments which elect to become self-insurer under 105.810 and 105.820, RSMo. 1969

Mr. J. Neil Nielsen

insure with an insurance company any excess insurance coverage above the limit established to self-insure?"

Section 105.810 provides as follows:

"The provisions of chapter 287, RSMo, governing workmen's compensation are extended to include all state employees. The state of Missouri shall have the option to become a self-insurer and assume all liability imposed by chapter 287, RSMo, or to purchase insurance in companies licensed to write workmen's compensation insurance in this state and if the state elects to self-insure, the attorney general shall appear on behalf of and defend the state in all actions brought by state employees under the provisions of the workmen's compensation law."

By the plain language of the statute, the state has two options only, either to assume all liability as a self-insurer or to purchase insurance. We believe the legislature has clearly indicated that one of the two options will be chosen with no intermixture of the options. Accordingly, in answer to your question, there is no authority for excess insurance coverage.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 72  
2-23-71, Eads

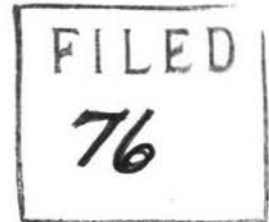


TAXATION (SALES & USE):           The Missouri Director of Revenue is not authorized to impose penalties and/or interest in addition to sales or use tax as provided in the sales tax statutes, Sections 144.010 to 144.510, RSMo 1969, on those individuals who fail to apply for a certificate of ownership on a newly acquired automobile within thirty days from the date of purchase, as required by Section 301.190, RSMo 1969. The only penalty collectible, if the certificate of ownership is not applied for within thirty days from the date of purchase, is that provided for in Section 301.190(3), RSMo, i.e., a penalty of five dollars for each month or fraction of a month of delinquency not to exceed twenty-five dollars.

OPINION NO. 76

October 27, 1976

Mr. A. Gerald Reiss, Director  
Department of Revenue  
4th Floor, Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Reiss:

This official opinion is issued in response to a request by your predecessor for a ruling on the following question:

"Should the Missouri Director of Revenue impose penalties and/or interest in addition to sales or use tax as provided in the sales tax statutes, Section 144.010 to Section 144.510, to those persons who fail to apply for a certificate of ownership on a newly acquired automobile within thirty days from the date of purchase, as required by Section 301.190, RSMo 1969?"

First, it should be noted that statutes imposing penalties for failure to pay a motor vehicle license fee or tax within the time provided by law are penal in nature and must be strictly construed. 60 C.J.S. Motor Vehicles § 142(1).

Chapter 144 authorizes the Director of Revenue to assess additional amounts against those persons who fail to file sales tax returns and remit taxes as required by Chapter 144. Section 144.080, RSMo 1969, reads as follows:

Mr. A. Gerald Reiss

"1. Every person receiving any payment or consideration upon the sale of property or rendering of service, subject to the tax imposed by the provisions of sections 144.010 to 144.510, is exercising the taxable privilege of selling the property or rendering the service at retail and is subject to the tax levied in section 144.020. He shall be responsible not only for the collection of the amount of the tax imposed on the sale or service to the extent possible under the provisions of section 144.285, but shall, on or before the thirtieth day of the month following each calendar quarterly period of three months, make a return to the director of revenue showing his gross receipts and the amount of tax levied in section 144.020 for the preceding quarter, and shall remit to the director of revenue, with the return, the taxes levied in section 144.020.

"2. Where the aggregate amount levied and imposed upon a seller by section 144.020 is in excess of two hundred and fifty dollars for either the first or second month of a calendar quarter, the seller shall pay such aggregate amount for such months to the director of revenue by the fifteenth day of the succeeding month. The amount so paid shall be allowed as a credit against the liability shown on the seller's quarterly return required by this section.

"3. Where the aggregate amount levied and imposed upon a seller by section 144.020 is less than forty-five dollars in a calendar quarter, the director of revenue shall by regulation permit the seller to file a return for a calendar year. The return shall be filed and the taxes paid on or before January thirty-first of the succeeding year."  
(Emphasis added)

This statute, then, provides for the collection, making of returns, and remittance of sales tax by every person exercising the taxable privilege of selling property or rendering service at retail. Subsection 4 of the above-quoted statutory provision specifically excludes the sales tax imposed on motor vehicle and

Mr. A. Gerald Reiss

trailers and states that said tax is to be collected as provided in Sections 144.070 and 144.440, RSMo 1969. In addition, Section 144.100, RSMo 1969, provides that no returns shall be filed as a result of transactions provided for in Sections 144.070 and 144.440.

Section 144.100 provides in part as follows:

"1. Every person making any taxable sales of property or service, except transactions provided for in sections 144.070 and 144.440, individually or by duly authorized officer or agent, shall make and file a written return with the director of revenue in such manner as he may prescribe." (Emphasis added)

Section 144.170, RSMo 1969, provides for the accrual of interest on delinquent taxes. Such section reads as follows:

"All taxes not paid to the director of revenue by the person required to remit the same on the date when the same becomes due and payable to the director of revenue, shall bear interest at the rate of three percent per calendar month, or fraction thereof, from and after such date until paid."

Section 144.250, RSMo 1969, provides for the assessment of a penalty if a person neglects or refuses to make a return and payment as required by Sections 144.010 to 144.510, RSMo 1969.

Section 144.500 imposes a penalty for fraud or evasion. Such section provides as follows:

"If fraud or evasion on the part of a person is discovered by the director of revenue, he shall determine the amount of which the state has been defrauded, shall add to the amount so determined a penalty equal to twenty-five percent thereof, and shall assess the same against the person. The amount so assessed shall be immediately due and payable; provided, however, that the director of revenue shall promptly thereafter give to said person written notice of such assessment and penalty, which notice shall be served personally on such person, or by registered mail.



Mr. A. Gerald Reiss

Such person shall have the right to petition for hearing of such assessment, as is provided herein."

Section 144.510 makes the violation of Sections 144.010 to 144.510 a misdemeanor.

The question then is whether the above penalties are applicable to the purchaser of a motor vehicle. It is the opinion of this office that the penalties imposed in the above provisions are designed to be imposed on a person who is required to collect sales tax, file returns, and remit sales tax.

The individual who purchases a motor vehicle is not required to collect sales tax or file a return. Rather, Section 144.070 provides that said individual is to remit the sales tax directly to the Director of Revenue. Such section reads as follows:

"1. At the time the owner of any new or used motor vehicle or trailer which was acquired in a transaction subject to sales tax under the Missouri sales tax law makes application to the director of revenue for an official certificate of title and the registration of said automobile or trailer as otherwise provided by law, he shall present to the director of revenue evidence satisfactory to said director of revenue showing the purchase price paid by or charged to the applicant in the acquisition of said motor vehicle or trailer, or that no sales tax was incurred in its acquisition, and if sales tax was incurred in such acquisition, such applicant shall pay or cause to be paid to the director of revenue the sales tax provided by the Missouri sales tax law in addition to the registration fees now or hereafter required according to law, and the director of revenue shall not issue a certificate of title for any new or used motor vehicle or trailer subject to sales tax as provided in said Missouri sales tax law until the tax levied for the sale of the same under sections 144.010 to 144.510 has been paid as herein provided.

"2. As used above, the term 'purchase price' shall mean the total amount of the contract

Mr. A. Gerald Reiss

price agreed upon between the seller and the applicant in the acquisition of said motor vehicle or trailer, regardless of the medium of payment therefor."

It is important to note that the foregoing statutory provision does not establish a due date for the remittance for said sales tax. It merely provides that the owner must pay the sales tax together with the registration fees prior to the issuance of a certificate of title for any new or used motor vehicle or trailer subject to the sales tax.

Section 301.190, RSMo 1969, states that a certificate of ownership is a prerequisite to the issuance of a certificate of registration. It further provides that:

". . . Application [for a certificate of registration of any motor vehicle or trailer] shall be made within thirty days after the applicant acquires the motor vehicle upon a blank form furnished by the director of revenue and shall contain a full description of the motor vehicle or trailer, manufacturer's or other identifying number, together with a statement of the applicant's source of title and of any liens or encumbrances on the motor vehicle or trailer, provided that for good cause shown the director of revenue may extend the period of time for making said application."

It follows, then, that the sales tax must be paid by the purchaser of the motor vehicle or trailer within thirty days after the acquisition of said motor vehicle or trailer. It is worth reiterating that, unlike the provisions of Chapter 144 requiring the making of returns and the remittance of sales tax by the seller of tangible personal property, the purchaser of a new motor vehicle or trailer is not required to make or file a return at the time he remits the sales tax. Section 301.190.3 provides for the imposition of a penalty if the certificate of registration is not acquired within thirty days after the purchase of the motor vehicle or trailer. It further provides in part as follows:

". . . If application for the certificate is not made within thirty days after the vehicle is acquired by the applicant, a delinquency penalty fee of five dollars for each month or part of a month of delinquency, not to

Mr. A. Gerald Reiss

exceed a total of twenty-five dollars, shall be imposed. If the director of revenue learns that any person has failed to obtain a certificate within thirty days after acquiring a motor vehicle or has sold a vehicle without obtaining a certificate, he shall cancel the registration of all vehicles registered in the name of the person, either as sole owner or as a coowner and shall notify the person that the cancellation will remain in force until the person pays the delinquency penalty fee provided in this section together with all fees, charges and payments which he should have paid in connection with the certificate of ownership and registration of the vehicle.  
..."

Subsection 4 of Section 301.190 further provides that it is unlawful for any person to operate a motor vehicle or trailer in this state which is required to be registered unless a certificate of ownership has been issued.

Section 301.440, RSMo 1969, imposes a general penalty for those violating the provisions of Chapter 301, RSMo 1969. It provides as follows:

"Any person who violates any provision of sections 301.010 to 301.440 for which no specific punishment is provided shall upon conviction thereof be punished by a fine of not less than five dollars or more than five hundred dollars or by imprisonment in the county jail for a term not exceeding one year, or by both the fine and imprisonment."

Keeping in mind the principal of statutory construction that penalty provisions are penal in nature and must be strictly construed, it is the opinion of this office that Chapter 301 does not impose a penalty on the individual who fails to pay the sales tax on a new or used motor vehicle or trailer, but rather only imposes a penalty on the failure of such individual to obtain a certificate of title and certificate of registration within thirty days after the purchase of the vehicle or trailer.

Accordingly, neither Chapter 144 nor Chapter 301 imposes a penalty on the purchaser of a new or used motor vehicle or trailer for the failure to pay the sales tax. The penalty provisions in Chapter 144 are directed toward those individuals who are required to file sales tax returns while the penalty provisions of Chapter 301

Mr. A. Gerald Reiss

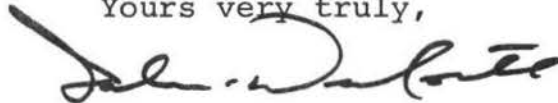
are focused on the failure to properly obtain the certificates of title and registration.

#### CONCLUSION

Therefore, it is the opinion of this office that the Missouri Director of Revenue is not authorized to impose penalties and/or interest in addition to sales or use tax as provided in the sales tax statutes, Sections 144.010 to 144.510, RSMo 1969, on those individuals who fail to apply for a certificate of ownership on a newly acquired automobile within thirty days from the date of purchase, as required by Section 301.190, RSMo 1969. The only penalty collectible, if the certificate of ownership is not applied for within thirty days from the date of purchase, is that provided for in Section 301.190(3), RSMo, i.e., a penalty of five dollars for each month or fraction of a month of delinquency not to exceed twenty-five dollars.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clarence Thomas.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written over a horizontal line.

JOHN C. DANFORTH  
Attorney General

SCHOOLS: In determining the "total amounts received by school districts under the provisions of this section" as required by subsection 8 of Section 163.031 the State Board of Education must take into account for any district entitled thereto the protection afforded by subsection 4 of Section 163.031.

OPINION NO. 77

July 13, 1976

Honorable Joe Frappier  
State Senator, District 22  
2665 Sorrell Drive  
Florissant, Missouri 63033

Honorable Wayne Goode  
State Representative, District 68  
7335 Huntington Drive  
Normandy, Missouri 63121



Dear Senator Frappier and Representative Goode:

This official opinion is in response to your request for a ruling on the following question:

"Does section 163.031, subsection 8, authorize that the minimum amount of money per pupil in average daily attendance under section 163.031, subsection 4 (Grandfather Clause) be increased as provided in section 163.031, subsection 8, should the general assembly transfer to the state school moneys fund in any year an amount in excess of the amount necessary to pay the school apportionments as provided in section 163.031, subsection 1 and 2, or does section 163.031, subsection 4, merely provide for a minimum amount of money per pupil in average daily attendance and bear no relationship to the distribution of funds in excess of those necessary to fully implement the formula."

Honorable Joe Frappier  
Honorable Wayne Goode

#### DEFINITIONS

The following terms when used in this opinion will have the meanings set forth below:

1. "Foundation Program" - The statutory procedure primarily set forth in Section 163.031, RSMo Supp. 1975, by which the state distributes financial aid to school districts.

2. "Minimum Guarantee" - The amount of money resulting from performing the computation called for by subsection 1 of Section 163.031, RSMo Supp. 1975.

3. "Formula Entitlement" - The amount obtained by subtracting from the minimum guarantee the deduction called for by subsection 2 of Section 163.031.

4. "Grandfather Clause" - Subsection 4 of Section 163.031.

5. "Proration Factor" - The percentage by which the money appropriated to and authorized to be spent from the state school moneys fund for the purpose of funding the Foundation Program in any given year exceeds the amount necessary to provide all school districts in the state the amount they are entitled to receive under subsections 1 and 2 and, for the reasons set forth in this opinion, subsection 4 of Section 163.031. The statutory basis for prorating the excess funds is subsection 8 of Section 163.031.

6. "Apportionment" - The amount of money allocated to each school district based on Section 163.031.

7. "Average Daily Attendance (ADA)" - This term is defined in Section 163.011 as the:

" . . . quotient or the sum of the quotients obtained by dividing the total number of days attended of resident pupils in grades kindergarten through twelve, inclusive, and between the ages of five and twenty in a term, by the actual number of days in that term and not including legal school holidays and legally authorized teachers' meetings;"



Honorable Joe Frappier  
Honorable Wayne Goode

#### STATUTORY PROVISIONS

Subsections 4 and 8 of Section 163.031, RSMo Supp. 1975, are of particular importance to this opinion:

"4. No district shall receive annually, during the biennium beginning in 1969, or thereafter, a less amount per pupil in average daily attendance from the state foundation program fund than it received in 1968-69 from the state appropriation for transportation allowance, special education, flat grant aid, first level equalization, second level equalization and teacher preparation aid.

\* \* \*

"8. It is hereby provided that should the general assembly transfer to the state school moneys fund in any year an amount in excess of the amount necessary to pay the school apportionment as provided in this section, the additional funds shall be distributed to the school districts of the state in the same ratio that the money available bears to the total amounts received by the school districts under the provisions of this section."

#### THE PROBLEM

Basically, the problem raised by your question is when, in computing the amount of state aid a district will receive under Section 163.031, does one consult the district's 1968-69 level of state aid to determine if that amount has been exceeded by the current year's proposed apportionment of state school moneys.

Honorable Joe Frappier  
Honorable Wayne Goode

### The State Board of Education's Position

Consistently since 1971-72,<sup>1</sup> the State Board of Education has determined a district's apportionment by: a) computing the district's formula entitlement; b) comparing the formula entitlement with the district's 1968-69 level of state aid; and c) applying the proration factor to the formula entitlement or to the 1968-69 level of state aid if it is greater than the formula entitlement. Using the State Board of Education's approach, a hypothetical district's apportionment would be computed as follows:

#### Example 1

Step 1 - Computation of the formula entitlement for each student in average daily attendance.

Minimum Guarantee	-	\$1,000,000
Deductions	-	500,000
Formula Entitlement	-	500,000
Average Daily Attendance (ADA)	-	2,000
Formula Entitlement per ADA	-	250

Step 2 - Computation of the amount of state moneys received by this district for each student in average daily attendance for 1968-69.

Grandfather Clause amount per ADA	-	300
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Step 3 - Computation of the district's apportionment for the current year by applying the proration factor to the Grandfather Clause amount per ADA because it is greater than the formula entitlement per ADA.

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<sup>1</sup>The 1971-72 school year was the first year that the General Assembly transferred to the school moneys fund an amount in excess of what was needed "to pay the school apportionment as provided in . . ." Section 163.031. The proration factor for that year was 1.03962. In 1970-71 and 1969-70, the proration factors were .73727 and .77721, respectively.



Honorable Joe Frappier  
Honorable Wayne Goode

Grandfather Clause		
amount per ADA	-	300
Proration factor	-	1.50
Apportionment per ADA	-	450
Average Daily Attendance	-	2,000
Apportionment of state funds for the current year	-	900,000

As the example demonstrates, the State Board of Education determines whether a district's 1968-69 level of state aid will be exceeded in the current year before prorating excess funds. If the 1968-69 level is greater than the district's formula entitlement, the proration factor is applied to the amount received by the district in 1968-69 and not to the amount of the district's formula entitlement for the current year. See Step 3 in Example 1. By applying the proration factor to a district's 1968-69 level of state aid, the district is protected not only from receiving less than it received in 1968-69, but it also shares on the same basis as other districts in the excess funds available under subsection 8.

The State Board of Education relies primarily on the wording of subsection 8 emphasized below to support its position:

"It is hereby provided that should the general assembly transfer to the state school moneys fund in any year an amount in excess of the amount necessary to pay the school apportionment as provided in this section, the additional funds shall be distributed to the school districts of the state in the same ratio that the money available bears to the total amounts received by the school districts under the provisions of this section." (Emphasis supplied.)

The State Board of Education argues that the last six words "under the provisions of this section" do not exclude any subsection or provision of Section 163.031. Therefore, because the Grandfather Clause is one of the subsections of

Honorable Joe Frappier  
Honorable Wayne Goode

Section 163.031, the formula entitlement of each school district in Missouri must be compared to each district's 1968-69 level of state aid before the excess funds are prorated pursuant to subsection 8. Every school district's formula entitlement or 1968-69 level of state aid, whichever is greater, is then added together to determine the denominator of the subsection 8 ratio,<sup>2</sup> i.e. the "total amounts received by the school districts under the provisions of this section."

#### The Goode-Frappier Position

Those who oppose the State Board of Education's position contend that the Grandfather Clause's only function is to provide a floor below which no district's state aid shall fall. Therefore, whether a district is entitled to Grandfather protection should be determined after both the formula entitlement has been computed and the proration factor has been applied to the formula entitlement. This position can be demonstrated using the same figures as were used in Example 1:

#### Example 2

Step 1 - Computation of the formula entitlement per student in average daily attendance.

Minimum Guarantee	-	\$1,000,000
Deductions	-	500,000
Formula Entitlement	-	500,000
Average Daily Attendance	-	2,000
Formula Entitlement per ADA	-	250

Step 2 - Application of the proration factor to formula entitlement per ADA.

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<sup>2</sup>The proration factor is determined as follows:

total amount appropriated to and authorized  
to be spent from school moneys fund = proration factor  
"total amounts received by the school districts under the provisions of this section"

Honorable Joe Frappier  
Honorable Wayne Goode

Formula Entitlement		
per ADA	-	250
Proration Factor	-	1.50
Apportionment per ADA	-	375

Step 3 - Determination of whether the district's 1968-69 level of funding per average daily attendance has been exceeded.

Grandfather Clause		
amount per ADA	-	300
Apportionment per ADA	-	375

Step 4 - Computation of the district's apportionment using the apportionment per ADA because greater than Grandfather level.

Apportionment per ADA	-	375
Average Daily Attendance	-	2,000
Apportionment of state funds	-	750,000

By comparing Examples 1 and 2, it can be seen that in certain situations consulting the Grandfather Clause after applying the proration factor will reduce the number of districts qualifying for Grandfather Clause protection and will reduce the amount of money some districts will receive.<sup>3</sup> In Example 2, the district's 1968-69 level of state funding is not used in computing the district's apportionment because the district's share of excess funds increases the apportionment per ADA over the Grandfather level. Therefore, the district, under Example 2, receives \$150,000 less money than under Example 1 solely because excess funds are allocated before it is determined whether the 1968-69 level of state funding has been exceeded.

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<sup>3</sup>If the Goode-Frappier approach had been utilized in the 1975-76 school year, the number of districts qualifying for Grandfather protection would have been reduced from 87 to 44 according to information supplied by the State Department of Elementary and Secondary Education. The State Department of Elementary and Secondary Education advises that if the Goode-Frappier approach had been used in the 1975-76 school year 81 school districts would have received smaller apportionments totalling \$3,939,663, which amount is 1.1% of the total state funds apportioned to Missouri school districts. This amount would have been divided among the remaining 482 districts on a prorata basis. The largest single reduction would have been \$472,466.

Honorable Joe Frappier  
Honorable Wayne Goode

It is contended by the proponents of the Goode-Frappier approach that the wording of subsection 4 indicates that a district is not supposed to get less than the Grandfather amount from the "state foundation program fund." The argument is made that the 1968-69 level of funding was intended to provide only a funding floor below which a district could not fall. To permit a district's Grandfather level of funding to be used as the basis for receiving more state aid than was received by a district in 1968-69 is said to be inconsistent with the basic nature of Grandfather clauses, i.e. to protect a designated class (in this case, all districts in existence in the 1969-70 school year and thereafter) from suffering financial loss as the result of the application of a new statutory formula for distributing state financial aid.

Furthermore, the proponents of the Goode-Frappier approach contend that one of the primary purposes of Section 163.031 was to reduce the disparity between wealthy school districts and poor school districts. They argue that under the State Board of Education's approach the equalizing intent of the foundation program is undercut. Some wealthier school districts, (which would not receive much, if any, state aid under subsections 1 and 2 because their large assessed valuations cause them to have large deductions under subsection 2,) receive not only their 1968-69 level of state aid, but, in addition, their prorata share of any excess funds. They illustrate this counter equalizing effect with actual figures from a wealthy Missouri school district.

### Example 3

#### STATE BOARD OF EDUCATION APPROACH

Step 1 - Compute formula entitlement per student in average daily attendance.

Minimum Guarantee	- \$ 782,608
Deductions	- 1,654,200

Honorable Joe Frappier  
Honorable Wayne Goode

Formula Entitlement	-	0
Average Daily Attendance	-	1,883.11
Formula Entitlement per ADA	-	0

Step 2 - Compute 1968-69 amount received by this district per student in average daily attendance.

Grandfather Clause amount per ADA	-	184.41189
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Step 3 - Compute the district's apportionment of state funds for the current year using the Grandfather amount per ADA because it is larger than the formula entitlement per ADA.

Grandfather Clause amount per ADA	-	184.41189
Proration Factor	-	1.541781
Prorated Grandfather Clause amount per ADA	-	284.32275
Average Daily Attendance	-	1,883.11
Apportionment of state funds for the current year	-	535,411

Adherents of the Goode-Frappier approach note that under the State Board of Education's approach this wealthy district is not only protected by the Grandfather Clause from receiving less state aid than was received in 1968-69 (their view of the intended function of the Grandfather Clause), but the district also shares in the excess funds because the proration factor is applied to the 1968-69 level of state funding.

#### Example 4

#### GOODE-FRAPPIER APPROACH

Step 1 - Compute formula entitlement per ADA.

Honorable Joe Frappier  
Honorable Wayne Goode

Minimum Guarantee	-	\$ 782,608
Deductions	-	1,654,200
Formula Entitlement	-	0
Average Daily Attendance	-	1,883.11
Formula Entitlement per ADA	-	0

Step 2 - Apply proration factor to formula entitlement per ADA.

Formula Entitlement per ADA	-	0
Proration Factor	-	1.541781
Prorated Formula Entitlement	-	0

Step 3 - Consult this district's 1968-69 level of funding to determine if it was in excess of the prorated formula entitlement for the current year.

Grandfather Clause amount per ADA	-	184.41189
Average Daily attendance	-	1,883.11
Apportionment of state funds for the current year	-	347,268

Under their approach, Goode-Frappier note that this wealthy district is protected by the Grandfather Clause from receiving no state school aid, but does not get to use their 1968-69 level as a springboard to an even greater share of state moneys at the expense of less wealthy districts. Goode-Frappier note that this result is entirely consistent with both the purpose of a Grandfather Clause and what they believe the General Assembly intended in adopting Section 163.031, i.e. to equalize the disparity between wealthy and poor districts.

#### DISCUSSION

The purpose of this legal opinion is to attempt to predict how a Missouri appellate court would rule if presented with the

Honorable Joe Frappier  
Honorable Wayne Goode

problem posed by this opinion request. We have been able to find no cases in Missouri or in any other jurisdiction interpreting language similar to Section 163.031 to serve as a guide to predicting how a Missouri court might rule on this question. Therefore, we must resort to general rules and guidelines obtained from Missouri appellate court decisions involving different factual situations.

The primary task of a court in determining whether a particular course of action is permitted or prohibited under a statute is to attempt to ascertain the intent of the legislature in enacting the particular language in question. Primary reliance is placed on the language used by the General Assembly.

"In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. It is a very well settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the court to give it force and effect.'" Betz v. Kansas City Southern Railroad Company, 284 S.W. 455, 461 (Mo. 1926).

". . . It is a familiar rule that where the language of a statute is plain and admits of but one meaning there is no room for judicial construction. Rathjen v. Reorganized School Dist. R-11 of Shelby County, 365 Mo. 518, 284 S.W.2d 516; Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S.W.2d 920. And under the guise of judicial interpretation we have no right to change the meaning of a plain and unambiguous statute. Stegall v. Morris, 363 Mo. 1224, 258 S.W.2d 577." McLaurin v. Frisella Moving and Storage Company, 355 S.W.2d 360, 364 (Mo.App. 1962).



Honorable Joe Frappier  
Honorable Wayne Goode

The words used by the General Assembly in subsection 8 of Section 163.031 are clear and unambiguous.<sup>4</sup> "Additional funds" are to be "distributed to the school districts of the state in the same ratio that the money available bears to the total amounts received by the school districts under the provisions of this section." The State Board of Education is not authorized by this language to ignore or disregard any provision of Section 163.031 in determining the "total amounts" received by the school districts of the state. The words "total amounts" and "under the provisions of this section" are unambiguous; the direction given by these words is explicit. The State Board of Education is not authorized to ignore the natural meaning of this language because of arguments as to the consequences of giving the language its natural meaning.

The State Board of Education is required by this language to initially determine the total amount of state aid all school districts in the state are entitled to "under the provisions of" Section 163.031. Subsection 4 is one of those provisions and no amount of conjecture about what individual legislators thought in 1969 can alter that fact. Once the total amount received by the school districts of the state under the provisions of Section 163.031 has been computed, the ratio between that figure and the amount available for distribution from the state school moneys fund is then computed.<sup>5</sup> All districts then receive their prorata share of the additional funds by multiplying their individual total amounts times the proration factor.

Even if the wording of subsection 8 would be found by a court to be ambiguous (see Footnote 2), the:

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<sup>4</sup> ". . . 'Language is ambiguous where it is susceptible of interpretation in opposite ways.' J. E. Blank v. Lennox Land Co., 351 Mo. 932, 174 S.W.2d 862, 868 (banc 1943). More directly in point, '[a] statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses.' State v. Lucas, 24 Wis.2d 262, 128 N.W.2d 425, 428 (1964)." State ex rel. School District of Kansas City v. Young, 519 S.W.2d 328, 331 (Mo.App. 1975).

<sup>5</sup> In the 1975-76 school year, the computation of the ratio ("proration factor") was as follows:

$$\frac{\$341,810,539}{\$220,586,400} = 1.549554$$



Honorable Joe Frappier  
Honorable Wayne Goode

" . . . interpretation given an ambiguous statute by an agency or branch of government charged with its execution or administration is entitled to great weight in judicially ascertaining legislative intent, and, concomitantly, in resolving the statutory ambiguity. Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. banc 1972); State ex rel. Curators v. Neill, 397 S.W.2d 666, 670 (Mo. banc 1966); and State ex rel. Harline v. Public Service Commission of Missouri, 343 S.W.2d 177, 182, 183 (Mo.App.1960). . . ." State ex rel. School District of Kansas City v. Young, 519 S.W.2d 328, 333 (Mo.App. 1975).

As previously noted, the State Board of Education has consistently since the 1971-72 school year (the first year there were excess funds to distribute pursuant to subsection 8) applied the proration factor to a district's 1968-69 level of state aid if greater than the current year's formula entitlement.

We are not unmindful of the policy arguments advanced by the proponents of the Goode-Frappier approach. There can be no question the General Assembly's primary purpose in providing for the deductions in subsection 2 was to equalize in part the disparity between wealthy and poor school districts. See State ex rel. School District of Kansas City v. Young, supra. However by enacting the Grandfather Clause, the General Assembly partially undercut the equalization achieved by the deduction in subsection 2. Certainly that is the effect of assuring certain wealthy school districts that if their deductions, which are based primarily on local wealth, are so great that they exceed the minimum guarantee, these districts will still get the same amount of state aid they received in 1968-69. Therefore, it becomes quite difficult to argue that the wording of subsection 8, if given its natural meaning, runs counter to a general equalizing intent for Section 163.031. To interpret subsection 8 as is done in this opinion does in some instances reduce further the equalization accomplished by subsection 2 but true equalization had already been dealt a body blow by the enactment of the Grandfather Clause.

Honorable Joe Frappier  
Honorable Wayne Goode

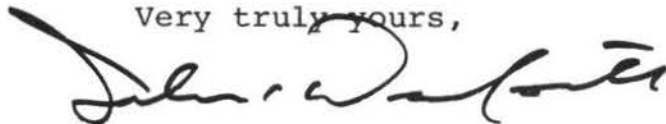
If the General Assembly in light of the changed circumstances occurring since 1969, i.e. yearly funding of the foundation program in excess of one hundred percent and the State Tax Commission's apparent intention to certify more realistic ratios to the State Board of Education, desires greater equalization, one of two courses of action is readily available. The General Assembly could repeal the Grandfather protection afforded by subsection 4 or it could phase out Grandfather protection over a period of years. Another way to achieve the kind of equalization advocated by the proponents of the Goode-Frappier approach would be to amend the language of subsection 8 by inserting immediately before the last two words of the subsection the words, "Subsections 1 and 2 of."

#### CONCLUSION

Therefore, it is the conclusion of this office that in determining the "total amounts received by school districts under the provisions of this section" as required by subsection 8 of Section 163.031 the State Board of Education must take into account for any district entitled thereto the protection afforded by subsection 4 of Section 163.031.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

May 19, 1976

OPINION LETTER NO. 79

Honorable Daniel J. O'Toole  
State Representative, District 55  
5082 Bristol Rock Road  
Florissant, Missouri 63033

Dear Representative O'Toole:

This is in response to your request for an opinion on the following question:

"If a teacher receives tenure and then in same school district takes job with administration does he still retain tenure?"

You have furnished no facts giving rise to your opinion request. Therefore, we shall assume that the administrative position taken by the teacher is that of principal or assistant principal.

Section 168.104(4), V.A.M.S., provides in part as follows:

" . . . Any permanent teacher who is promoted with his consent to a position of principal or assistant principal, or is first employed by a district as a principal or assistant principal, shall not have permanent status in such position but shall retain tenure in the position previously held within the district, or, after serving two years as principal or assistant principal, shall have tenure as a permanent teacher of that system."  
(Emphasis added)

Honorable Daniel J. O'Toole

Based on the foregoing language, a tenured teacher who assumes a position as principal or assistant principal in the same school district retains his tenure.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH  
Attorney General

DEPARTMENT OF MENTAL HEALTH:  
DEPARTMENT OF ELEMENTARY AND  
SECONDARY EDUCATION:  
HANDICAPPED CHILDREN:  
SCHOOLS:

The school district of residence of a handicapped child's parents or guardian must pay to the Department of Mental Health the local tax effort per child of

that district when the handicapped child has been admitted to the programs or facilities of the Department. If a district is billed by the Department of Mental Health and there is a dispute over whether the child's parents live in the billed district, the dispute between the district and the Department should be resolved within the ninety-day period provided in Section 162.970, RSMo Cum. Supp. 1975. After the expiration of the ninety-day period, all delinquent districts should be certified by the Department of Mental Health to the State Board of Education. The State Board of Education, in reliance on that certification, should deduct from subsequent payments of state aid to the delinquent district the amount owed to the Department and remit that amount to the Department of Mental Health.

October 19, 1976



OPINION NO. 80

Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Elementary and  
Secondary Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Commissioner Mallory:

The following is in response to your request for the legal opinion of this office on three questions pertaining to the education of handicapped children admitted to the programs and facilities of the Department of Mental Health. Each question will be separately quoted and answered below.

Factually, you advised that the Department of Mental Health has billed school districts for special educational services provided persons between the ages of five and twenty-one, who "allegedly" reside in the districts which

Dr. Arthur L. Mallory

were billed. These bills were mailed by the Department of Mental Health only after the State Auditor criticized the Department of Mental Health for its failure to do so. Apparently, the Department had not sent these bills before the State Auditor's criticism was received because an effort was being made in the General Assembly to change Section 162.970 to avoid the necessity of billing school districts.

In answering your questions, we understand that you are concerned about situations in which the handicapped child in question has a parent or guardian living some place in Missouri. Therefore, we do not consider the type of situation discussed in Opinion No. 26, dated April 8, 1971, in which neither a parent nor a guardian lives in Missouri.

Question No. 1

"1. What is the school district's obligation to pay the Department of Mental Health for special education services provided persons in the following factual circumstances:

"a. A school district contracts or refers a student enrolled in the public school to the Department of Mental Health for special education services;

"b. A parent who resides in the school district sends his child to a facility of the Department of Mental Health for special education without the knowledge of the district;

"c. An individual who is under twenty-one but who has either dropped out of the school program or who has graduated from the school program receives special education services from the Department of Mental Health (such persons may have been assigned by the court or may have voluntarily enrolled in the program);

"d. An individual between the ages of five and twenty-one years who was referred to the Department of Mental Health for diagnostic services by a juvenile officer or by the Department of Family Services."

Dr. Arthur L. Mallory

Subsection 1 of Section 162.970, RSMo Cum. Supp. 1975, provides:

"1. Handicapped children who are admitted to the programs or facilities provided by the division of mental health shall have a right to the services provided by sections 162.670 to 162.995, and shall not be denied admission to any appropriate public school or special school district program where the child actually resides because he is admitted to the program or facility provided by the division of mental health, but nothing in sections 162.670 to 162.995 shall prevent the division of mental health from providing or procuring such special educational services to such children. The school district, except school districts which are a part of a special school district, or the special school district of residence of the parent or guardian of every handicapped child for whom special educational services are provided or procured by the division of mental health, or the district which would otherwise be responsible for providing gratuitous education for such child, shall be responsible for per pupil costs for special education services for such child in an amount not to exceed the average sum produced per child by the local tax effort of the district."

Section 162.970 pertains only to "handicapped children." See Section 162.675, RSMo Cum. Supp. 1975, in which "handicapped children" and "severely handicapped children" are separately defined.

In Opinion No. 290, dated December 6, 1974, this office concluded that school districts or, where formed, special school districts are primarily responsible for providing special educational services to handicapped children. However, when handicapped children are admitted to the programs or facilities of the Department of Mental Health, the Department must assure that these handicapped children receive the special educational services to which they are entitled. These special educational services can either be provided by the Department of Mental Health pursuant to



Dr. Arthur L. Mallory

Chapter 202, RSMo 1969, as amended, or these special educational services can be provided by sending the children to the local or special school districts in which the Mental Health facility is located. Whether a particular handicapped child is educated directly by the Department or by a local or special school district is a decision to be made in each instance by the Department of Mental Health.

The Department of Mental Health's obligation to make this decision arises regardless of how a handicapped child comes to be admitted to the programs or facilities of the Department. It makes no difference whether a handicapped child comes to be admitted to the Department's programs or facilities by action of a school district, by action of a child's parents, or by action of some third party. In each instance, the Department must determine the best method for providing special educational services.

If the Department of Mental Health determines that a handicapped child should receive special educational services from the Department, the school district or special school district of residence of the parents or guardian of the child must pay to the Department "an amount not to exceed the average sum produced per child by the local tax effort of the district. Section 162.970(1).

Similarly, if the Department of Mental Health determines that a handicapped child is best educated in the school district (regular or special) in which the Mental Health facility is located, the district of residence of the child's parents or guardian is still responsible for making the payment to the Department of Mental Health. However, in this instance, the educating district, which is not the district of residence of the child's parents or guardian, is eligible for state financial assistance in educating that child in accordance with Sections 162.975 through 162.990, RSMo 1975 Supp. Furthermore, provided the Department of Mental Health has received the necessary appropriation from the General Assembly, the department shall pay for each child receiving special educational services from a local or special school district, which is not the district of residence of the child's parents or guardian, an amount equal to the amount collected by the Department of Mental Health from the district of residence of the child's parents or guardian. See Opinion No. 290, page 4, and Section 162.970.



.Dr. Arthur L. Mallory

Obviously, the General Assembly intended by requiring payment of the local tax effort by the district of residence of the handicapped child's parents or guardian to provide some financial relief for the Department of Mental Health or the educating district where the educating district was not the district of residence of the child's parents or guardian. Absent such a provision, placement of a handicapped child in the programs or facilities of the Department of Mental Health would constitute a windfall to the district of residence of the child because it would still receive the tax benefit of having the child's parents or guardian as residents in the district, but would not have any financial responsibility to educate the child.

Therefore, whenever a handicapped child is enrolled in the programs or facilities of the Department of Mental Health, the school district of residence of the child's parents or guardian must, in each instance listed in Question No. 1, pay to the Department of Mental Health an amount equal to the district's local tax effort per child.

#### Question No. 2

"2. What actions are available to a district which receives a bill for services provided by the Department of Mental Health for which they had not contracted and the parents of the child do not reside in the district?"

As we stated in response to question No. 1, whether the local school district of residence of the handicapped child's parents or guardian contracted with the Department of Mental Health or not to furnish special educational services is not determinative. If the Department of Mental Health or a school district other than the district where the child's parents or guardian reside furnishes such services to a child admitted to the Department's programs or facilities, the district of residence of the child's parents or guardian must pay toward the education of that child the amount of its local tax effort per child.

If the parents or guardian of the child do not reside in the district which has been billed, the billed district would not be responsible for the payment. Presumably, the Department of Mental Health would cancel the bill upon being shown by the billed district that the parents were not residents.

Dr. Arthur L. Mallory

Question No. 3

"3. If a bill presented to a school district is not paid within the prescribed time and is referred to the Department of Elementary and Secondary Education, what is the legal obligations of the state board of education with respect to:

- "a. validating the charge;
- "b. withholding of payment of state funds;
- "c. making payment to the Department of Mental Health."

Subsection 2 of Section 162.970 provides as follows:

"2. Failure of a district to pay such amount to the division of mental health within ninety days after a bill is submitted by the division shall result in deduction of the amount due by the state board of education from subsequent payments of any state financial aid due such district and in the payment by the state board of education to the director of mental health of the amount deducted."

Subsection 2 of Section 162.970 provides a ninety-day period for districts to pay any bill submitted by the Department of Mental Health. During that period of time, any disputes between the district and the Department of Mental Health should be resolved. After the expiration of the ninety-day period, the Division of Mental Health should certify to the State Board of Education the amounts unpaid and the State Board of Education should proceed forthwith in reliance on that certification to make the required deduction from subsequent payments of state moneys to the delinquent school districts.

The procedure for paying the deducted amounts to the Director of Mental Health, as required by subsection 2 of Section 162.970, should be worked out between the State Board of Education, the State Auditor, the State Treasurer, the Office of Administration, and the Department of Mental Health.

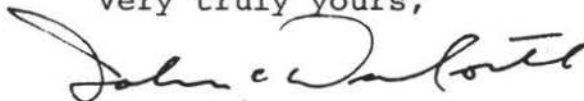
Dr. Arthur L. Mallory

CONCLUSION

Therefore, it is the conclusion of this office that the school district of residence of a handicapped child's parents or guardian must pay to the Department of Mental Health the local tax effort per child of that district when the handicapped child has been admitted to the programs or facilities of the Department. If a district is billed by the Department of Mental Health and there is a dispute over whether the child's parents live in the billed district, the dispute between the district and the Department should be resolved within the ninety-day period provided in Section 162.970, RSMo Cum. Supp. 1975. After the expiration of the ninety-day period, all delinquent districts should be certified by the Department of Mental Health to the State Board of Education. The State Board of Education, in reliance on that certification, should deduct from subsequent payments of state aid to the delinquent district the amount owed to the Department and remit that amount to the Department of Mental Health.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

Op. 290, 12-6-74.

STATE AUDITOR: (1) The Bi-State Development Agency of  
REORGANIZATION ACT: the Missouri-Illinois Metropolitan Dis-  
trict and the Kansas City Area Transporta-  
tion Authority of the Kansas City Area Transportation District should  
not be included within the scope of an audit of the Missouri Depart-  
ment of Transportation, conducted pursuant to Section 29.200, RSMo.  
(2) The Missouri-St. Louis Metropolitan Airport Authority should be  
included within the scope of an audit of the Missouri Department of  
Transportation, conducted pursuant to Section 29.200, RSMo. (3)  
The Missouri-Tennessee Bridge Commission, the Missouri-Illinois  
(Canton) Bridge Commission, the Missouri-Illinois (Ste. Genevieve)  
Bridge Commission, and the Missouri-Illinois-Jefferson-Monroe Bridge  
Commission should not be included within the scope of an audit of  
the Missouri Department of Transportation, conducted pursuant to  
Section 29.200, RSMo.

May 20, 1976

OPINION NO. 81



Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Lehr:

The following opinion is in response to your request as follows:

"Am I authorized to include the follow-  
ing public bodies within the scope of an au-  
dit of the Department of Transportation:

1. Missouri-St. Louis Metropol-  
itan Airport Authority;
2. Bi-State Development Agency of  
the Missouri-Illinois Metropolitan District;
3. Kansas City Area Transportation  
Authority of the Kansas City Area Trans-  
portation District;
4. The four two-state bridge com-  
missions contained in Section 14.5 of the  
Omnibus State Reorganization Act of 1974  
(V.A.M.S. 1975 Appendix, pp. 76, et seq.)."

Honorable George W. Lehr

The State Auditor is authorized to audit the Department of Transportation (hereinafter MoDOT) pursuant to Section 29.200, RSMo, which states in relevant part:

"The state auditor shall postaudit the accounts of all state agencies. . . ."

The Omnibus State Reorganization Act of 1974, V.A.M.S. 1976, Appendix B, pp. 10, et seq. (hereinafter the Reorganization Act), creates a Department of Transportation, Section 14, p. 31. (See also: Article IV, Section 32(a); Section 33, Missouri Constitution.) The following provisions of Section 14 pertain to this opinion request:

"2. The Missouri-St. Louis Metropolitan Airport Authority, chapter 305, RSMo, the Bi-State Development Agency of the Missouri-Illinois Metropolitan District, as authorized by section 70.370, the Kansas City Area Transportation Authority District, as authorized by chapter 238, RSMo, are assigned to the department of transportation.

\* \* \*

"5. The Missouri-Illinois bridge commission, section 234.500, RSMo; the Missouri-Illinois bridge commission, section 234.580, RSMo; the Tennessee-Missouri bridge commission, section 234.360, RSMo and the Missouri-Illinois bridge commission (Canton), section 234.430, RSMo are transferred by type III transfer to the department of transportation, and members of the bridge commissions shall be appointed by the transportation commission." (Emphasis added)

Section 1.7(1) of the Reorganization Act Act defines a "type III" transfer and "specific-type" transfer as follows:

"(c) Under this act a type III transfer is the transfer of a department, division, agency, board, commission, unit or program to the new department with only such supervision by the head of the department for budgeting and reporting as provided under subdivisions (4) and (5) of subsection 6, of

Honorable George W. Lehr

this section and any other supervision specifically provided in this act or later acts. Such supervisions shall not extend to substantive matters relating to policies, regulative functions or appeals from decisions of the department, division, agency, board, or commission unless otherwise provided by this act or later acts. The method of appointment under type III transfer will remain unchanged unless specifically altered by this act or later acts.

"(d) Under this act a specific type transfer is any transfer other than type I, type II and type III transfers."

The Missouri-St. Louis Metropolitan Airport Authority (hereinafter the Airport Authority), the Bi-State Development Agency (hereinafter Bi-State), and the Kansas City Area Transportation Authority (hereinafter KCATA) are "assigned" to the Department of Transportation. This office has expressed its opinion that the language "assigned," as utilized in the Act, constitutes a "specific-type" transfer. Furthermore, a "specific-type" transfer does not provide what the effect will be except to allow the conclusion that the agency is "placed" within the department. Opinion No. 53, Garrett, March 18, 1975. That opinion concerned the Office of Adjutant General. The Office of Adjutant General is expressly defined as part of the "military division of the executive department of state government" under the direct control of the Governor. Article IV, Section 6; Section 41.040, RSMo.

Bi-State and KCATA were created by interstate compacts entered into with Illinois and Kansas, respectively, and approved by Congress. Therefore, the issue is whether the same conclusion reached, concerning the Adjutant General, can be drawn for said entities which are "assigned" to MoDOT.

This office has recently rendered its opinion that Bi-State and KCATA are not independent "state agencies" authorized to be audited by the State Auditor pursuant to Section 29.200, RSMo. Opinion No. 142, Lehr, July 24, 1975 (copy enclosed). The fundamental question here is whether the General Assembly has authority to "place" Bi-State and KCATA within a department of state government for any purported administrative regulation at the state level, including an audit by the State Auditor.

In Opinion No. 142, 1975, we expressed doubt concerning the authority of the state of Missouri to unilaterally subject Bi-State and



Honorable George W. Lehr

KCATA to an audit. Relying on the case of Bush Terminal Co. v. City of New York, 273 N.Y.S. 331 (1934), we stated that such interpretation of Section 29.200, RSMo, would undermine the rights and privileges conferred upon the states of Illinois and Kansas by the respective compacts. It is our view that Section 14.2 of the Reorganization Act, as it relates to Bi-State and KCATA, is invalid for the same reason because it purports to unilaterally subject Bi-State and KCATA to some undefined regulation as a part of an executive department of state government.

Further support for this view is found in Delaware River and Bay Authority v. Carello, 222 A.2d 794 (Ch. Del. 1966); Port of New York Authority v. J. E. Linde Paper Co., 127 N.Y.S.2d 155 (1953); and Henderson v. Delaware River Joint Toll Bridge Commission, 66 A.2d 843 (Penn. 1949). In Carello, *supra*, the Court of Chancery of Delaware held that a Delaware act establishing collective bargaining rights for public employees could not be applied to employees of an agency created by an interstate compact. The court acknowledged that a state surrenders a portion of its sovereignty when it enters into an interstate compact and, therefore, it looked to the compact for authority relative to employees and held that neither state could unilaterally alter the powers contained in the compact.<sup>1</sup>

In J. E. Linde Paper Co., *supra*, the Municipal Court of the City of New York, held that the New York Port Authority was exempt from the New York Emergency Rent Law. The court rested its judgment, in part, upon the fact that application of the act would constitute a unilateral imposition of a burden on the authority's powers by regulation of one of the states in derogation of the compact.

In Henderson, *supra*, the Pennsylvania Supreme Court held that a statute, which waived any requirement for a bi-state bridge commission to obtain street occupancy permission from a municipality, was valid. The court reasoned, at page 849, that the legislation was:

" . . . in no way in derogation of anything contained in the original and supplemental compacts to which both New Jersey and Congress have assented. Actually, the statute is in aid of the Commonwealth's expeditious fulfillment of its undertakings in the compacts. . . ."

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<sup>1</sup>Both compacts in question here contain a similar provision. Section 70.370; Article III(8); Section 238.010, RSMo; Article III (11).

Honorable George W. Lehr

The court recognized that individual states can enact legislation which furthers the purposes of a compact but are without authority to diminish or dilute any authority contained in a particular compact. The court stated at pages 849-850:

"Of necessity, Pennsylvania acted unilaterally in the matter, but she was, nonetheless, well within her rights in further empowering the Commission so as to enable it, with respect to matters within this State's jurisdiction, to perform adequately and completely the purposes of the Commission's creation. It is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact. See *Olin v. Kitzmiller*, 259 U.S. 260, 263, 42 S.Ct. 510, 66 L.Ed. 930, affirming the same case as reported in 9 Cir., 268 F. 348; also *P. J. McGowan & Sons, Inc., v. Van Winkle*, U.S.D. C.Or., 21 F.2d 76, affirmed by the Supreme Court in 277 U.S. 574, 48 S.Ct. 435, 72 L.Ed. 995, in a memorandum opinion '\* \* \* on the authority of *Olin v. Kitzmiller*, 259 U.S. 260, 263, 42 S.Ct. 510, 66 L.Ed. 930.'"

See also: *Rao v. Port of New York Authority*, 122 F.Supp. 595 (E.D. N.Y. 1954) aff'd 222 F.2d 362 (2nd Cir. 1955).

Thus, it is our view that the state of Missouri lacks authority to unilaterally subject Bi-State or KCATA to regulation which would be in derogation of authority granted to the commissioners of the respective entities by each compact. Therefore, we conclude that any interpretation of Section 14.2 of the Act which would subject Bi-State or KCATA to regulation, as part of an executive department of state government, is invalid. From the foregoing, it is our conclusion that Bi-State and KCATA should not be included within the scope of an audit of the Department of Transportation, conducted pursuant to Section 29.200, RSMo.

The Missouri-St. Louis Metropolitan Airport Authority (Sections 305.500 to 305.585, RSMo Supp. 1973), presents a different issue. It was created by the General Assembly and is defined as a "body corporate and a political subdivision of the state." Section 305.510.1. As previously cited, Section 14.2 of the Reorganization Act "assigns" the Airport Authority to MoDOT. The Airport



Honorable George W. Lehr

Authority receives regular appropriations from general revenue. (See: Section 4.780, House Bill No. 4, 78th General Assembly, First Regular Session.) Thus, the issue concerning the Airport Authority is distinguishable from the Bi-State/KCATA issue because the Airport Authority was solely created by the General Assembly.

The Airport Authority is established as an independent entity with the power to sue and be sued, Section 305.510; to contract generally, Section 305.550(1); to employ all necessary personnel, Section 305.550(2); and to exercise full powers relating to the acquisition and operation of airports, Sections 305.520 and 305.525, including the power of condemnation, Section 305.520.2, and the authority to issue revenue bonds, Section 305.530. Therefore, the rare, and perhaps unique, situation exists wherein the General Assembly has initially established an independent political subdivision and body corporate, and has subsequently "placed" it within an executive department of state government for some undefined regulatory control. The question is whether the General Assembly is authorized to do the above.

The state constitution, unlike the federal constitution, is not a grant of power but, as to legislative power, is only a limitation; except for the restrictions imposed by the state constitution, power of the state legislature is unlimited and practically absolute. Article II, Section 1, Missouri Constitution; State ex inf. Danforth ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo.Banc 1975); Household Finance Corporation v. Shaffner, 203 S.W.2d 734 (Mo.Banc 1947); State ex inf. Dalton ex rel. Holekamp v. Holekamp Lumber Co., 340 S.W.2d 678 (Mo.Banc 1960) app. dismissed 366 U.S. 715 reh. den. 368 U.S. 870. Any doubt concerning the power of the legislature must be resolved in favor of the General Assembly and against nullifying or restricting its power of operation. Brown v. Morris, 290 S.W.2d 160 (Mo.Banc 1956). Transportation within the state is subject to reasonable regulation by the state, in the exercise of its police powers and such power may be delegated to a subdivision to facilitate administration of the laws of the state. State ex rel. Audrain County v. City of Mexico, 197 S.W.2d 301 (Mo. 1946).

We are not aware of any restriction of legislative authority in the Constitution which would prohibit the legislature from subjecting a previously-created political subdivision of the state to regulation by an executive department of state government. With this in mind, and considering the above-stated principles, it is our view that the General Assembly was authorized to "place" the Airport Authority within MoDOT. As such, it follows that the Airport Authority should be considered within the scope of an audit of MoDOT, conducted pursuant to Section 29.200, RSMo.

Honorable George W. Lehr

The remaining question concerns the four bridge commissions transferred by "type III" to MoDOT. They are:

- (1) Missouri-Tennessee, Sections 234.360-234.420, RSMo
- (2) Missouri-Illinois (Canton), Sections 234.430-234.490, RSMo
- (3) Missouri-Illinois (Ste. Genevieve), Sections 234.500-234.570, RSMo
- (4) Missouri-Illinois-Jefferson-Monroe, Sections 234.580-234.650, RSMo

All four commissions are created by interstate compact with requisite approval by Congress.

The status of the bridge commissions is identical to that of KCATA and Bi-State, for purposes of answering the question involved here. Thus, it is our opinion that the General Assembly is without authority to unilaterally subject these commissions to regulation, as part of an executive department of state government. Any such attempt would be in derogation of the compacts entered into by the respective states and as approved by the United States Congress.

#### CONCLUSION

It is the opinion of this office that:

(1) The Bi-State Development Agency of the Missouri-Illinois Metropolitan District and the Kansas City Area Transportation Authority of the Kansas City Area Transportation District should not be included within the scope of an audit of the Missouri Department of Transportation, conducted pursuant to Section 29.200, RSMo.

(2) The Missouri-St. Louis Metropolitan Airport Authority should be included within the scope of an audit of the Missouri Department of Transportation, conducted pursuant to Section 29.200, RSMo.

(3) The Missouri-Tennessee Bridge Commission, the Missouri-Illinois (Canton) Bridge Commission, the Missouri-Illinois (Ste. Genevieve) Bridge Commission, and the Missouri-Illinois-Jefferson-Monroe Bridge Commission should not be included within the scope of an audit of the Missouri Department of Transportation, conducted pursuant to Section 29.200, RSMo.

Honorable George W. Lehr

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 142  
7-24-75, Lehr



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
JEFFERSON CITY

June 28, 1976

OPINION LETTER NO. 82  
Answer by Letter - Blackmar

Honorable Robert A. Young  
Missouri Senate, 24th District  
3500 Adie Road  
St. Ann, Missouri 63074



Dear Senator Young:

This is in response to your request for an opinion on the following question:

"Because of the restrictions set forth in Section 408.052(1), RSMo., 1969, in addition to a one (1) point origination fee, may a lender charge a borrower on residential real estate (other than a construction loan) for bona fide expenses paid by the lender to a third party who is a wholly-owned subsidiary of the lender, for services actually performed by such subsidiary in connection with the loan?"

In your opinion request you further point out:

"Lenders throughout the State of Missouri have wholly-owned subsidiaries who are capable of rendering services such as appraisals and credit investigations in connection with real estate loans. There is confusion as to whether a lender may charge borrower for such services actually performed by the wholly-owned subsidiary and paid for by the lender."

With respect to residential real estate loans, Section 408.052.1, RSMo 1975 Supp. provides in part:

Senator Robert A. Young

"No lender shall charge, require or receive, on any residential real estate loan, any points or other fees of any nature whatsoever, excepting a one percent origination fee, whether from the buyer or the seller or any other person, except that the lender may charge bona fide expenses paid by the lender to third parties for services actually performed in connection with a loan. . . ."

Our answer to your opinion request is based on the assumption that the subsidiary corporation is wholly owned and that the fees charged by the lender are for credit investigations and appraisals conducted by the subsidiary corporation. While this opinion is not limited to wholly-owned savings and loan service corporations, it is applicable to such corporations. The opinion is not applicable to corporations, including a savings and loan service corporation, which are not wholly owned by the lender.

We must determine whether wholly-owned subsidiaries are "third parties" as that term is used in Section 408.052.1. We find no authoritative definition of the term "third parties" which determines the question. To ascertain the meaning of the term "third parties" we must examine the purpose of the section and the changes the legislature intended to make by enacting that section. In so doing, we note the following:

1. Appraisals and credit investigations in connection with a residential real estate loan are primarily for the benefit of the lender rather than the borrower.

2. It is not an uncommon practice for the lender to make its own appraisal or credit investigation rather than engaging a third party to do the same.

3. Prior to the enactment of Section 408.052.1, RSMo 1975 Supp., some lenders when making residential real estate loans imposed fees for appraisals and credit investigations. It appears that the purpose of Section 408.052.1, RSMo 1975 Supp., is to prevent lenders from receiving such fees in addition to the interest charged on such loans.

4. Savings and loan associations, which are substantial residential real estate lenders in this state, are permitted to own stock in loan service corporations, Section 369.219, RSMo 1975 Supp. The activities in which a service corporation may engage are subject to regulation by the director of the Division of Savings and Loan Supervision. Such activities, for

Senator Robert A. Young

the most part, are closely associated with the normal business of the savings and loan associations. In particular, the director of the Division of Savings and Loan by Regulation No. Fifty-75 (a)(4)(iii)(a) permits service corporations to perform services, primarily for savings and loan associations, including providing credit information and appraisals.

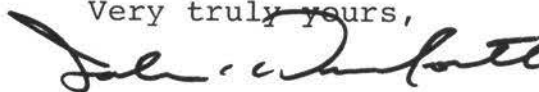
Absent compelling circumstances, the courts of this state will give effect to the separate identity of a subsidiary corporation notwithstanding the fact that it is entirely owned by its parent. See, i.e., State v. Shell Pipeline Corporation, 139 S.W.2d 510 (Mo. 1940). However, courts will disregard a distinct corporate existence where a corporation is organized and controlled and its affairs are conducted in such a fashion to make it an instrumentality or adjunct of another corporation. The courts of the state will do so in order to defeat wrong or injustice where the rights of third persons are concerned. Osler v. Joplin Life Insurance Co., 164 S.W.2d 295, 298 (Mo. 1942).

In May Department Stores Co. v. Union Electric, Light & Power Co., 107 S.W.2d 41 (Mo. 1937), the Supreme Court held that a public utility could not charge higher utility rates through the use of a subsidiary corporation than the utility could charge if the subsidiary did not exist. It noted that reason and precedent support the proposition that rate regulation cannot be avoided by the use of subsidiary corporations.

We find the rate regulation analogy appropriate. It would frustrate the intent of legislation which is intended to prohibit lenders from charging for credit investigations and appraisals in connection with residential real estate loans to permit such charges to be exacted through the use of wholly-owned subsidiaries. We hold that with respect to credit investigations and appraisals a wholly-owned subsidiary of the lender is not a third party as contemplated by Section 408.052.1, RSMo 1975 Supp., and that a lender may not charge the borrower for services performed by such corporation. In holding a wholly-owned subsidiary is not a third party for purposes of that section, we do not hold that a subsidiary cannot be treated as a separate entity for other purposes.

It is our view that Section 408.052.1, RSMo 1975 Supp., prohibits a lender from charging borrowers in connection with residential real estate loans for appraisals and credit investigations performed by a wholly-owned subsidiary of the lender.

Very truly yours,

  
JOHN C. DANFORTH  
Attorney General





OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

**ATTORNEY GENERAL OF MISSOURI**  
**JEFFERSON CITY**

April 7, 1976

OPINION LETTER NO. 83

Honorable Russell Goward  
Representative, District 65  
Room 312, State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Goward:

This letter is in response to your opinion request asking whether a prosecuting attorney has authority under Section 208.040, V.A.M.S., to initiate civil proceedings to secure support for the children referred to in Section 208.040. If the prosecuting attorney does have authority to initiate civil as well as criminal proceedings under Section 208.040, you inquire further whether the prosecuting attorney is limited to any particular form of civil proceeding.

Section 208.040 provides that aid shall be granted on behalf of certain dependent children. Subsection 2 of that section also provides in part as follows:

" . . . When any report is made to the prosecuting attorney of the desertion or nonsupport of a child for whom benefits are claimed, and the whereabouts of the deserting or defaulting parent is known, or can be ascertained, it shall be the duty of the prosecuting attorney to fully investigate all the facts concerning the desertion or nonsupport and institute such action as he deems necessary to secure support for such child. If the prosecuting attorney determines for any reason that an action should not be instituted, a report of his findings and the reason an action was not instituted

Honorable Russell Goward

shall be made to the division of family services.  
... " (Emphasis added)

It seems clear that in enacting the quoted provision the legislature has not in any manner attempted to limit the form of the action the prosecutor might bring. It is thus our view that the prosecuting attorney may, under Section 208.040, bring whatever action either civil or criminal he deems appropriate to secure support for such child.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH  
Attorney General



May 5, 1976

OPINION LETTER NO. 85  
Answer by Letter - Burns

Mr. W. Dale Burke  
Prosecuting Attorney  
Barry County Courthouse  
Cassville, Missouri 65625



Dear Mr. Burke:

This letter is in answer to your recent opinion request asking:

"Whether the County Court, in a third class county, is authorized to terminate the position of Prosecutors criminal investigator, partially funded by the Missouri Council on Criminal Justice, by cutting the Prosecuting Attorney's budget after full funding for the position has been approved in said budget by the Court subsequent to budget hearings in February as provided by statute."

We find no express statutory authority authorizing the prosecuting attorney of a third class county to be furnished an investigator to be paid for out of public funds. However, if the county court determines that as a matter of fact there is a necessity for the furnishing of an investigator for the prosecuting attorney's office, we believe that such an expenditure of public funds is authorized. The fact that investigators are authorized for some other classes of counties in Missouri does not prevent the providing of an investigator for a third class county prosecuting attorney's office even in the absence of a statute authorizing the hiring of an investigator in such a county.

In the case of Rinehart v. Howell County, 153 S.W.2d 381 (Mo. 1941) the Supreme Court of Missouri held that where a county

Mr. W. Dale Burke

court had determined that the furnishing of secretarial services for a prosecuting attorney in a third class county was indispensably necessary to the transaction of the business of said office, the fact that secretarial service was authorized by statute for first and second class counties did not prevent the payment for such secretarial services for the prosecuting attorney of a third class county.

The court said, l.c. 383:

"Appellant points out that, by Secs. 13514, 13467, 12952, and 12979, R.S.1939, Mo.St.Ann. p. 7056, Sec. 11875, p. 7042, Sec. 11835, p. 606, Sec. 11326, and p. 613, Sec. 11353, the General Assembly authorized and established salaries for stenographic services to prosecuting attorneys in the larger counties of the State, did not provide for like services in counties of the population of Howell county, and contends for the application of the maxim *expressio unius est exclusio alterius*. . . .

"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected--an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. . . ."

Mr. W. Dale Burke

You state in your opinion request that the county court did authorize the expenditure of county funds for an investigator for the prosecuting attorney's office during the years 1974 and 1975, and included in its budget for 1976, provision for payment of county funds for such investigator. You further state that payments have been made for such investigator out of county funds during the year of 1976, but that the county court made an order purportedly stating that no further payment would be made to the prosecuting attorney's investigator after April 1, 1976.

It appears, therefore, that since the county court does have authority to provide for an investigator for the prosecuting attorney's office in third class counties and since the county court in this instance provided in the 1976 budget for the payment of an investigator for the prosecuting attorney's office, the question is whether or not the county court has authority to amend its budget during the 1976 budget year by refusing to pay out of budgeted county funds for an investigator for the prosecuting attorney's office.

We believe that this question is answered by the enclosed Opinion No. 41, rendered March 17, 1944, to W. A. Holloway, and Opinion No. 346, rendered November 6, 1964, to Virgil Conkling.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 41  
3/17/44, Holloway  
  
Op. No. 346  
11/6/64, Conkling



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

April 14, 1976

OPINION LETTER NO. 86

Honorable Clarence H. Heflin  
Representative, District No. 39  
State Capitol Building, Room 304  
Jefferson City, Missouri 65101

Dear Representative Heflin:

This letter is in response to your opinion request in which you ask the following:

- "1. Does Section 456.040 R.S. Mo. apply to motion picture films?
- "2. If Section 456.040 R.S. Mo. does apply to motion picture films, would the enactment of H.B. 1654 change the present law with respect to motion picture films?"

House Bill No. 1654, Second Regular Session, Seventy-Eighth General Assembly, provides as follows:

"Section 1. Whenever any person, firm or corporation, enagaged [sic] in the leasing of motion picture films, shall require a deposit or advance payment to be made by the lessee to bind the lessee to the performance of the contract, then the money so deposited, with any accruing interest thereon, shall, until returned or applied in accordance with the terms of the contract or agreement, continue to be the money of the person making the deposit and shall become and remain a trust fund in the possession of the person with whom the

Honorable Clarence H. Heflin

deposit shall be made. The person, firm or corporation, receiving the deposit shall be the holder of the fund as trustee. The trustee shall, within seven days after the receipt of the trust fund, deposit the same in some bank or trust company in the county in which the cestui que trust resides or has his principal office or place of business. The bank or trust company shall notify the cestui que trust when the fund is deposited. The fund shall not be commingled with any other funds or assets of the trustee. Any waiver or attempt to waive the provisions of this section is void."

Section 456.040, RSMo 1969, provides:

"Whenever any person, firm or corporation, engaged in the leasing of personal property, shall require a deposit or advance payment to be made by the lessee to bind the said lessee to the performance of such contract, then such money so deposited, with any accruing interest thereon, shall, until returned or applied in accordance with the terms of such contract or agreement, continue to be the money of the person making the deposit and shall become and remain a trust fund in the possession of the person with whom such deposit shall be made, and the person, firm or corporation, receiving such deposit shall be the holder of such fund as trustee, and as the trustee as herein defined shall forthwith, and within seven days after the receipt of such trust fund, deposit the same in some bank or trust company in the county in which the cestui que trust shall reside or have his principal office or place of business, and such fund shall not be mingled with any other funds or assets of said trustee. Any person, firm or corporation receiving any money in trust, as herein defined, who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor; provided, however, that this section

Honorable Clarence H. Heflin

and section 456.050 shall not apply to such transactions where the property used or leased is delivered to lessee at time of agreement and remains in the actual and continuous possession of lessee during the term of such agreement." (Emphasis added.)

Section 456.050, RSMo 1969, provides:

"Any person, firm or corporation being a trustee, as provided in section 456.040, who shall violate any of the provisions thereof, shall pay to the depositor a sum of money double the amount of the deposit or advance payment, which may be recovered in any court of competent jurisdiction, together with a reasonable attorney's fee to be fixed by the court and collected as other costs in the case. Any waiver or attempt to waive the provisions of sections 456.040 and 456.050 shall be void."

First of all it appears clear that motion picture film is personal property within the meaning of Section 456.040. House Bill No. 1654 essentially uses the same language in the first lengthy sentence of Section 456.040 with the exception that the House Bill requires that the cestui que trust be notified when the fund is deposited by the bank or trust company holding such fund.

The House Bill does not contain the last sentence of Section 456.040 except with respect to the provision of such section containing the prohibition against commingling the funds. The provisions of Section 456.040 which make a violation of that section a misdemeanor are omitted from the House Bill, and in addition the exclusion which we have underscored above in Section 456.040 is omitted from the House Bill. Further, Section 456.050 which contains provisions making the lessor liable for double the amount of the deposit so held when there is a violation of the provisions of Section 456.040 is not contained in the House Bill.

Apparently, then the significant differences except for the fact that the House Bill does not contain the misdemeanor or other penalty provisions is in the scope of the application of

Honorable Clarence H. Heflin

Section 456.040. That is, as we indicated, the latter part of that section provides that such section and Section 456.050:

" . . . shall not apply to such transactions where the property used or leased is delivered to lessee at time of agreement and remains in the actual and continuous possession of lessee during the term of such agreement."

Therefore, while Sections 456.040 and 456.050 may be applicable to motion pictures since motion pictures are personal property, Section 456.040 is much more limited in its scope than the bill by reason of the quoted exception.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

JUDGMENTS:

MOTOR VEHICLES:

MOTOR VEHICLE SAFETY RESPONSIBILITY LAW:

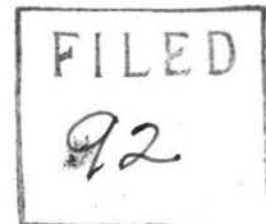
Chapter 303, RSMo, requires the Director of Revenue to suspend a person's driver's li-

cense and registration upon receipt of a certified copy of a final judgment pursuant to Sections 303.090, 303.100, and 303.110, RSMo 1969, when said judgment is rendered against that person by a court of competent jurisdiction of any state or of the United States as a result of a claim for damages arising out of the ownership, maintenance, or use of any motor vehicle. There is no statutory requirement that the injury giving rise to said claim must either occur in this state or on the public highways and streets of this state.

OPINION NO. 92

December 9, 1976

Mr. A. Gerald Reiss, Director  
Department of Revenue  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Reiss:

This is in response to a request for an official opinion of this office by your predecessor. His request reads as follows:

"Does Chapter 303, the motor vehicle safety responsibility law for the state of Missouri, require the Missouri Director of Revenue to suspend the drivers license and motor vehicle registration plates of a person when notice is received pursuant to Section 303.090, RSMo 1969, of an unsatisfied judgment against such person stemming from an automobile accident upon private property?"

Chapter 303, RSMo 1969, and amendments thereto are entitled "The Motor Vehicle Safety Responsibility Law." The purpose of this law is to protect the public from injury or damage by the operation of motor vehicles upon public highways. City of St. Louis v. Carpenter, 341 S.W.2d 786 (Mo. 1961).

Chapter 303 provides two separate methods for implementing the above legislative policy. First, it requires those persons involved in automobile accidents to file accident reports. Section 303.040 of S.S.H.B. No. 1392, Second Regular Session, 78th General Assembly, provides as follows:



Mr. A. Gerald Reiss

"1. The operator or owner of every motor vehicle which is involved in an accident within this state or the owner of a legally or illegally parked car which is in any manner involved in an accident within this state, with an uninsured motorist, upon the streets or highways thereof, in which any person is killed or injured or in which damage to property of any one person, including himself, in excess of one hundred dollars is sustained, and the owner or operator of every motor vehicle which is involved in an accident within this state if such owner or operator does not carry motor vehicle liability insurance shall within sixty days after such accident report the matter in writing to the director if settlement of accident agreed to by all the parties involved has not been made. Such report, the form of which shall be prescribed by the director, shall contain such information as will enable the director to determine whether the requirements for the deposit of security under section 303.030 are inapplicable by reason of the existence of insurance or other exceptions specified in this chapter. The director may rely upon the accuracy of such information unless and until he has reason to believe that the information is erroneous. If such operator be physically incapable of making such report, the owner of the motor vehicle involved in such accident shall, with sixty days after learning of the accident, make such report. If the operator is also the owner and is incapable of filing such report as is required by this section then the report will be filed as soon as the operator-owner is so capable. If the report is late by reason of incapability, a doctor's certificate must accompany the report certifying same. The operator or the owner shall furnish such additional relevant information as the director shall require.

"2. If any party involved in an accident files a report under this section, the

Mr. A. Gerald Reiss

director shall notify, within ten days after receipt of the report, all other parties involved in the accident as specified in the report that a report has been filed and such other parties shall then furnish within ten days the director with such information as the director may request to enable the director to determine whether the requirements of section 303.030 are applicable."

Upon receipt of the accident reports, the Director of Revenue, under provisions of Section 303.030, RSMo Supp. 1975, is authorized to demand security deposits from certain individuals involved in automobile accidents on the highways and streets of this state. Such section provides as follows:

"1. If within twenty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death, or damage to the property of any one person in excess of one hundred dollars, the director does not have on file evidence satisfactory to him that the person who would otherwise be required to file security under subsection 2 of this section has been released from liability, or has been finally adjudicated not to be liable, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident, the director shall determine the amount of security which shall be sufficient in his judgment to satisfy any judgment for damages resulting from such accident as may be recovered against each operator or owner.

"2. The director shall, within forty-five days after the receipt of such report of a motor vehicle accident, suspend the license of each operator, and all registrations of each owner of a motor vehicle, in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this state, and if such a owner is a nonresident the privilege of the use within this state of

Mr. A. Gerald Reiss

any motor vehicle owned by him, unless such operator or owner or both shall deposit security in the sum so determined by the director; provided notice of such suspension shall be sent by the director to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security.

"3. Where erroneous information is given the director with respect to the matters set forth in subdivision (1), (2), or (3) of subsection 4 of this section, he shall take appropriate action as hereinbefore provided, within forty-five days after receipt by him of correct information with respect to said matters.

"4. This section shall not apply under the conditions stated in section 303.070, nor:

(1) To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;

(3) To such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the director, covered by any other form of liability insurance policy or bond; nor

(4) To any person qualifying as a self-insurer under section 303.220, nor to any person operating a motor vehicle for such self-insurer."

Mr. A. Gerald Reiss

Exceptions to the requirements are found in Section 303.070 of S.S.H.B. No. 1392, Second Regular Session, 78th General Assembly, which provides as follows:

"The requirements as to security and suspension in section 303.030 shall not apply:

(1) To the operator or the owner of a motor vehicle involved in an accident wherein no injury or damage was caused to the person or property of anyone other than such operator or owner;

(2) To the owner of a motor vehicle if at the time of the accident the vehicle was being operated without his permission, express or implied, or was parked by a person who had been operating such motor vehicle without such permission; nor

(3) If, prior to the date that the director would otherwise suspend the license and registration or nonresident's operating privilege under section 303.030, there shall be filed with the director evidence satisfactory to him that the person who would otherwise be required to file security has been released from liability or been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments, with respect to all claims for injuries or damages resulting from the accident."

The second method which the legislature adopted to implement its policy takes place after a court judgment is rendered. This post-judgment procedure is set out in Sections 303.090, 303.100, and 303.110, RSMo 1969. Section 303.090 requires the clerk or judge of the court in which any person fails to satisfy any final judgment within sixty days to forward a certified copy of said judgment to the Director of Revenue. Such section states as follows:

"1. Whenever any person fails within sixty days to satisfy any final judgment in amounts and upon a cause of action as herein stated,

Mr. A. Gerald Reiss

it shall be the duty of the clerk of the court, or of the judge of a court which has no clerk, in which any such judgment is rendered within this state, to forward to the director immediately after the expiration of said sixty days, a certified copy of such judgment.

"2. If the defendant named in any certified copy of a judgment reported to the director is a nonresident, the director shall immediately transmit a certified copy of the judgment to the official in charge of the issuance of licenses and registration certificates of the state of which the defendant is a resident."

Section 303.100 requires the Director of Revenue to suspend the license and registration of the person against whom the judgment has been rendered upon receipt of a certified copy of the judgment. This section reads as follows:

"1. The director, upon the receipt of a certified copy of a judgment, shall forthwith suspend the license and registration and any nonresident's operating privilege of any person against whom such judgment was rendered, except as hereinafter otherwise provided in this section and in section 303.130.

"2. If the judgment-creditor consents in writing, in such form as the director may prescribe, that the judgment-debtor be allowed license and registration or nonresident's operating privilege, the same may be allowed by the director, in his discretion, for six months from the date of such consent and thereafter until such consent is revoked in writing notwithstanding default in the payment of such judgment, or of any installments thereof prescribed in section 303.130 provided the judgment-debtor furnishes proof of financial responsibility."

Section 303.110 delineates the extent and duration of the suspension. It provides as follows:

Mr. A. Gerald Reiss

"Such license, registration and nonresident's operating privilege shall remain so suspended and shall not be renewed, nor shall any such license or registration be thereafter issued in the name of such person, including any such person not previously licensed, unless and until every such final judgment is stayed, satisfied in full or to the extent hereinafter provided and until the said person gives proof of financial responsibility subject to the exemptions stated in sections 303.100 and 303.130. A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment-debtor from any of the requirements of this chapter."

Sections 303.090, 303.100, and 303.110 do not define or limit the term "judgment." Rather, these provisions use the term in a very broad and all inclusive manner. However, Section 303.020(3), RSMo 1969, provides the following definition of "judgment."

"'Judgment', a final judgment by a court of competent jurisdiction of any state or of the United States, upon a claim for relief for damages, including damages for care and loss of services, because of bodily injury to or death of any person, or for damages because of injury to or destruction of property, including the loss of use thereof, or upon a claim for relief on any agreement or settlement for such damages arising out of the ownership, maintenance or use of any motor vehicle;"

The term "judgment," then, includes a final judgment by a court of competent jurisdiction of any state or of the United States which is based upon a claim for relief for damages arising out of the ownership, maintenance, or use of any motor vehicle. Accordingly, it is the opinion of this office that the type of judgment which precipitates the suspension of driving privileges is not limited to claims for damages resulting from accidents occurring on the highways and streets of this state, but includes all claims for damages arising out of the ownership, maintenance, or use of any motor vehicle.



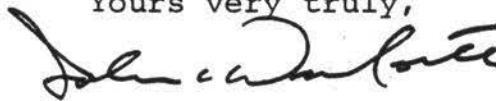
Mr. A. Gerald Reiss

CONCLUSION

Therefore, it is the opinion of this office that Chapter 303, RSMo, requires the Director of Revenue to suspend a person's driver's license and registration upon receipt of a certified copy of a final judgment pursuant to Sections 303.090, 303.100, and 303.110, RSMo 1969, when said judgment is rendered against that person by a court of competent jurisdiction of any state or of the United States as a result of a claim for damages arising out of the ownership, maintenance, or use of any motor vehicle. There is no statutory requirement that the injury giving rise to said claim must either occur in this state or on the public highways and streets of this state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clarence Thomas.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

June 24, 1976

OPINION LETTER NO. 93

Dr. Arthur L. Mallory  
Commissioner of Education  
Department of Elementary and  
Secondary Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's state plan for the administration of vocational education under the Vocational Education Amendments Act of 1968, as amended.

Our review has taken into consideration the Vocational Education Act of 1963, Pub.L. 88-210, as amended; the Vocational Amendments Act of 1968, Pub.L. 90-576, as amended; the applicable federal regulations (45 C.F.R. Parts 100, 102, and 103; 41 Fed. Reg. 1395-1397, January 7, 1976); Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a), and 2(b), Missouri Constitution; Sections 161.092, 161.112, 161.122, and 178.420 through 178.580, V.A.M.S.; Sections 5.2 and 6.7 of the Omnibus Reorganization Act of 1974; and related provisions.

It is the opinion of this office that:

1. The Missouri State Board of Education is the state agency solely responsible for the administration of vocational education in Missouri and is, therefore, the "State Board" as that term is defined in 20 U.S.C. § 1248(8);
2. The Missouri State Board of Education has the authority under state law to submit a state plan for the administration of vocational education;



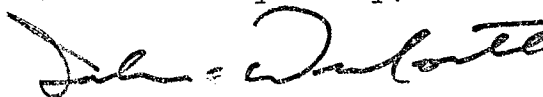
Dr. Arthur L. Mallory

3. The Missouri State Board of Education has the authority to administer or supervise the administration of the foregoing state plan;

4. All provisions contained in the foregoing state plan are consistent with state law;

5. The Commissioner of the Missouri Department of Elementary and Secondary Education has been duly authorized by the Missouri State Board of Education to submit the foregoing state plan to the United States Commissioner of Education and to represent the Missouri State Board of Education in all matters relating thereto.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
JEFFERSON CITY

May 12, 1976

OPINION LETTER NO. 96

Honorable Earl L. Schlef  
Representative, District 60  
1672 Maldon Lane  
Dellwood, Missouri 63136

Dear Representative Schlef:

This opinion letter is issued in response to your request for a ruling on the following question:

May a wholesaler licensed under the Liquor Control Laws of Missouri sell intoxicating liquor or nonintoxicating beer to a retail licensee who is delinquent in his accounts with any other wholesale licensee?

Section 311.070, RSMo 1969, provides that:

"1. Distillers, wholesalers, wine makers, brewers or their employees, officers or agents, shall not, under any circumstances, directly or indirectly, have any financial interest in the retail business for sale of intoxicating liquors, and shall not, directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers."  
(Emphasis added)

Section 312.060, RSMo 1969, contains a like provision with respect to the malt beverage and nonintoxicating beer industry.

The liquor control statutes do not further define the term "ordinary commercial credit."

Honorable Earl L. Schlef

However, the Supervisor of Liquor Control, by Sections 311.660 (10) and 312.360(10), RSMo 1969, is empowered to make rules and regulations which are "necessary and feasible for carrying out the provisions" of the liquor control law and which are not inconsistent therewith. Pursuant to this authority, the Supervisor has established Regulation 1(e), which defines the phrase "ordinary commercial credit" as follows:

"(1) Malt Beverages. Ordinary commercial credit as used in the malt beverage and non-intoxicating beer industry shall be credit on such terms as shall require payment to be made by the retail licensee by the last day of the month for malt beverages or non-intoxicating beer which is delivered to such retail licensee on or after the first (1) day of the month and up to and including the fifteenth (15) day of the month and by the fifteenth (15) day of the month next succeeding for malt beverages or nonintoxicating beer which is delivered to such retail licensee on or after the sixteenth (16) day of the month and up to and including the last day of the month. No brewer or wholesaler shall sell or deliver to any retail licensee any malt beverage or nonintoxicating beer while such retail licensee owes such brewer or wholesaler for any malt beverage or nonintoxicating beer beyond the period of time in this paragraph set forth.

"(2) Intoxicating Liquor Other Than Malt Beverage. Ordinary commercial credit as used in the intoxicating liquor industry, other than the malt beverage industry, shall be credit on such terms as shall require payment to be made by the retail licensee within thirty (30) days after the delivery of any intoxicating liquor, other than malt beverage, to such retail licensee. No distiller, wholesaler or wine maker shall sell or deliver to any retail licensee any intoxicating liquor, other than malt beverage, while such retail licensee owes such distiller, wholesaler, or wine maker for any intoxicating liquor, other than malt

Honorable Earl L. Schlef

beverage, beyond the period of time in this paragraph set forth."

The above-quoted regulation clearly prohibits any wholesaler from selling to a retailer who does not make timely payment to such wholesaler but does not, by its terms, prohibit a wholesaler from selling to a retailer whose accounts are delinquent with any other wholesaler.

Accordingly, the only question remaining is whether the regulation constitutes a proper exercise of the Supervisor's rule-making authority. As noted above, no definition of the term "ordinary commercial credit" is found in the liquor control law, nor have any cases been found which interpret the term. It is the opinion of this office, however, that the use of that term does not, perforce, prohibit a wholesaler from selling to a retailer who is in debt to any other wholesaler. This opinion is supported by the following factors:

First, the term "ordinary commercial credit" is used in Section 311.070 in a context which evidences a legislative intent to prevent financial control of retailers by wholesalers. As stated in Brown-Forman Distillers Corporation v. Stewart, 520 S.W.2d 1, 7 (Mo.Banc 1975), citing Section 311.070:

"The . . . [Liquor Control] statutes indicate a legislative intent to preclude a licensee in one phase of the liquor traffic from controlling other separate and distinct phases of the liquor traffic, thereby controlling traffic in liquor in its entirety. . . ."

Additionally, the remaining paragraphs of Section 311.070 provide the following:

"2. Any distiller, wholesaler, wine maker or brewer who shall violate the above provisions of this section, or permit his employees, officers or agents to do so, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as follows:

(1) For the first offense, by a fine of one thousand dollars;

Honorable Earl L. Schlef

(2) For a second offense, by a fine of five thousand dollars; and

(3) For a third offense, the license of said person shall be revoked.

"3. All contracts entered into between distillers, brewers and wine makers, or their officers or directors, in any way concerning any of their products, obligating such retail dealers to buy or sell only the products of any such distillers, brewers or wine makers or obligating such retail dealers to buy or sell the major part of such products required by such retail vendors from any such distiller, brewer or wine maker, shall be void and unenforceable in any court in this state."

It appears, therefore, that Section 311.070 was aimed primarily at preventing a wholesaler from becoming financially interested in a retail operation. Reading the statute as a whole, there is no indication that the use of the term "ordinary commercial credit" was intended to force retailers to keep all their accounts current.

Secondly, the implementation of a law prohibiting a wholesaler from selling to a retailer in debt to any other wholesaler would necessarily require wholesalers to provide regular reports of their delinquent accounts for distribution to other wholesalers. The liquor control statutes require wholesalers to submit several different monthly reports (see, e.g., Sections 311.370, 311.334, 311.336, and 312.170) containing such information as current price schedules and amounts of liquor stored. But there is no like provision for the reporting of delinquent retail accounts. The absence of such a reporting requirement indicates that the legislature did not consider universally current accounts as a prerequisite to the selling and purchasing of liquor or beer.

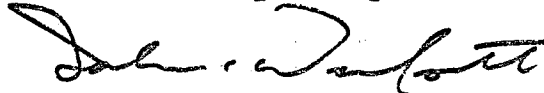
Finally, in Passler v. Johnson, 304 S.W.2d 903 (Mo. 1957), the Missouri Supreme Court had an opportunity to review a Kansas City ordinance which provided for the regular reporting of delinquent accounts and which expressly prohibited a wholesaler from selling to a retailer who was delinquent with any other wholesaler. The precise issue decided in Passler was that the Kansas City ordinance was consistent with state law, the court holding that the ordinance was an "additional requirement" and an "enlargement" of the prohibition contained in Section 311.070. The court said, l.c. 907:

Honorable Earl L. Schlef

"Thus, it is apparent that under the state law a Kansas City retailer, even though indebted to a particular wholesaler beyond the time of the credit limits specified in regulation 1(g), could, nevertheless, purchase either for cash or on 'ordinary commercial credit' from another wholesaler and from successive other wholesalers so long as he could find a willing new one. . . ."

It is, therefore, our view that the promulgation of Liquor Control Regulation 1(e), which defines "ordinary commercial credit," is a proper exercise of the Supervisor of Liquor Control's rule-making powers and that a wholesaler licensed under the liquor control laws may sell intoxicating liquor and nonintoxicating beer to a retail licensee who is delinquent in his accounts with another licensee insofar as the state liquor law is concerned.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

June 28, 1976

OPINION LETTER NO. 98

JOHN C. DANFORTH  
ATTORNEY GENERAL

Honorable Charles J. Becker  
Representative, District 123  
P. O. Box 22  
Arnold, Missouri 63010

Dear Representative Becker:

This opinion letter is issued in response to your request for a ruling on the following questions:

May the licensee of an establishment licensed under the liquor laws of this state refuse service or entry to a person between the ages of 18 and 21 years who does not intend to consume intoxicating liquor on the premises? May he order the minor to leave?

Is the answer to the above-stated question affected if the minor is accompanied by a person over the age of 21 years?

We understand that your inquiry is directed to the question of whether statutes or state liquor regulations are violated in the factual situation you described and your inquiry does not pertain to municipal ordinances.

In order to place these questions in their proper perspective, two explanatory matters should be noted. First, the exclusion of minors from licensed premises is not required by state law. Section 311.310, RSMo 1969, makes it unlawful for any licensee to sell, vend, give away, or otherwise supply intoxicating liquor to any person under the age of 21. Additionally, Rule 70-2.140(15) of the Rules and Regulations of the Supervisor of Liquor Control states

Honorable Charles J. Becker

that no licensee shall permit anyone under the age of 21 to consume intoxicating liquor on or about his licensed premises. There is no state law or agency regulation in Missouri which, per se, prohibits a minor from entering or remaining on licensed premises even without consuming intoxicating liquor, although several other states do have such a law (see, e.g., Article XX, Section 537(a)(7), Okla. Stat. Ann.; Section 66.44.310, Revised Code of Washington).

Secondly, a violation of Section 311.310 or of Rule 70-2.140(15) would subject the licensee to suspension or revocation of his liquor license, Section 311.660, RSMo. Thus, as a practical matter, a licensee whose establishment attracts young patrons or is dimly lit might feel that he can best prevent these violations by excluding minors altogether.

Since licensees are not required by law to exclude minors from licensed premises, it must then be determined whether any law prohibits them from doing so. The liquor laws of Missouri contain no such prohibition, and the only other statute which might possibly apply would be the Missouri Public Accommodations Law, Chapter 314, RSMo. Section 314.010 of that Act provides that all persons are entitled to the full and equal use of public accommodations ". . . without discrimination or segregation on the grounds of race, creed, color, religion, national origin or ancestry."

Assuming that a liquor-licensed establishment constitutes a place of public accommodation as defined in Chapter 314, the language of Section 314.010 does not prohibit discrimination on the basis of age. Accordingly, Chapter 314 would not prohibit a licensee from excluding minors from his licensed premises. The federal public accommodation law similarly contains no prohibition against discrimination on the basis of age. See 42 U.S.C. § 2000a.

Finding no other state statute which would apply to the rights of minors in this situation, it is the conclusion of this office that a licensee is not prohibited by any state law from either refusing service or denying entry to minors on his licensed premises. And since entry may be refused to a minor initially, the licensee would similarly be free to order the minor to leave the premises if entry is gained.

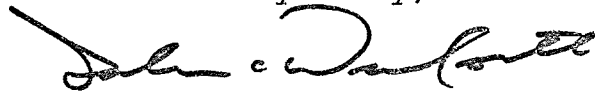
Your second question seeks to determine the effect, if any, on the conclusions stated above when the minor is accompanied by a person over the age of 21. We have been unable to find any statute, case law, regulation, or opinion which indicates that the presence of an adult is in any way relevant to the foregoing conclusions.



Honorable Charles J. Becker

It is, therefore, the opinion of this office that the presence of an adult would not alter the rights of a licensee with respect to minors on the premises.

Yours very truly,

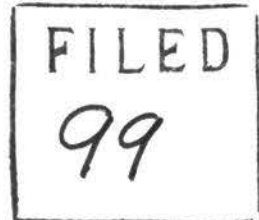
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JOHN C. DANFORTH  
Attorney General

July 1, 1976

OPINION LETTER NO. 99  
Answer by letter-Verhagen

Honorable John E. Scott  
Representative, District 87  
6659 Lindenwood Place  
St. Louis, Missouri 63109



Dear Representative Scott:

This letter is in response to your request for this office's opinion on the following:

- "1. Under the provisions of Chapter 287, RSMo 1969, does the insurance company providing workmen's compensation insurance or the employer have the right to select the physician to provide treatment for an insured employee?
- "2. Does any provision of Chapter 287, RSMo 1969 prohibit the selection of a Doctor of Chiropractic licensed under Missouri Statutes to provide treatment for an insured employee covered by workmen's compensation insurance?"

You advise with respect to your first question that:

"Situations have arisen wherein an employer wishes to have an insured employee treated by a particular physician and the insurance carrier intervenes, informing the patient or the employer to change physicians."

The responsibility of the employer to provide medical treatment to the employee under Missouri's Workmen's Compensation Law is set forth in Section 287.140, RSMo 1969, as follows:

Honorable John E. Scott

"1. In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical and hospital treatment, including nursing, ambulance and medicines, as may reasonably be required for the first one hundred eighty days after the injury or disability, to cure and relieve from the effects of the injury, and thereafter such additional similar treatment as the division or the commission by special order may determine to be necessary. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. . . ."

In response to your first question, it appears from the above-quoted language of Section 287.140 that the employer has the sole responsibility to provide medical treatment to the employee; and accordingly, it is reasonable to conclude that the responsibility just noted carries with it the concomitant right to select the physician to provide such treatment. However, other statutory provisions contained in Chapter 287 need to be considered.

Section 287.030 defines "employer" and subsection 2 within this section states:

"Any reference to the employer shall also include his insurer."

Also, it is provident to consider the language of Section 287.300 which provides, in relevant part, that:

"If the employer is not insured his liability hereunder shall be primary and direct. If he is insured his liability shall be secondary and indirect, and his insurer shall be primarily and directly liable hereunder to the injured employee, his dependents or other persons entitled to rights hereunder. . . ."  
(Emphasis supplied)

We construe Sections 287.030.2 and 287.300 to mean that an insurer has a responsibility concurrent to that of the employer for the provision of medical treatment under Section 287.140 of our Workmen's Compensation Law. We are of the opinion that, as in the case of the employer, this responsibility to provide treatment carries with it the concomitant right to determine what medical treatment is "reasonably required" pursuant to Section 287.140. Accordingly, it

Honorable John E. Scott

would be entirely compatible with the foregoing analysis for the insurer to select the treating physician in certain instances.

We are, of course, cognizant that the construction we have given the above-noted sections of the Workmen's Compensation Law does not provide an answer to your question of whether:

" . . . the insurance company . . . or the employer have the right to select the physician to provide treatment for an insured employee?"

However, to answer this question we must, of necessity, find that either the employer or insurer have a paramount or superior right of selection as a matter of law. This, we choose not to do inasmuch as in the absence of any statutory or judicial direction on this question, we find it much preferable to leave this issue for private resolution by mutual agreement between the respective parties.

It is our understanding that, as a practical matter, the question of who has right to initially select a treating physician is normally resolved by prearrangement between the employer and his insurer. And, when a difference of opinion arises in this regard, the employer or insurer are, of course, free to terminate their business relationship with each other and seek a more acceptable arrangement with another party. For this reason then, it is difficult to conceive of very many instances where your first question poses a problem of any significance. It should be noted that the primary emphasis intended to be given Section 287.140 is that the injured employee should be reimbursed for expenses incurred as a result of a work-related injury. This obligation of the employer or the insurer to provide such medical treatment remains intact irrespective of whether the employer or insurer initially makes the selection of treatment and regardless of whether either party disagrees with the selection the other has made. See, e.g.: Johnson v. Kruckemeyer, 29 S.W.2d 730 (St.L.Ct.App. 1930).

In conclusion, we believe that both the employer and the insurer have a responsibility to provide medical treatment to an injured employee under the Workmen's Compensation Law; however, with regard to the question of whether the employer's or insurer's right of selection of a treating physician is paramount to the other, we believe such issue is best left to private resolution by mutual agreement between the respective parties.

Your second question asks whether any provision of the Workmen's Compensation Law prohibits the selection of a duly licensed chiropractor to provide treatment for an injured employee.

Honorable John E. Scott

At the outset, it should be noted that there is no provision within Chapter 287, RSMo 1969, which expressly prohibits or limits the use of chiropractic services in administering to the health needs of an injured employee covered by such law. Instead, the prohibition, if one exists, must be gleaned from that portion of Chapter 287 which establishes the respective rights and responsibilities of parties with respect to medical treatment. In addition, such provisions must be read in conjunction with Section 287.800 which reads, in relevant part, that:

"All of the provisions of this chapter shall be liberally construed with a view to the public welfare, . . ." (Emphasis supplied)

The basic responsibilities of the employer and rights of the employee with respect to medical treatment are set forth in Section 287.140. Subsection 1 of Section 287.140 states, inter alia, that:

". . . If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. . . ." (Emphasis supplied)

It seems obvious that an employee can select anyone he or she desires for treatment of an injury so long as it is at his or her own expense. That this is true, we believe, is not subject to question. However, the issue of the propriety of chiropractic services does arise under the provisions of Section 287.140 when we consider the employer's obligation to provide medical treatment and the employee's right to be reimbursed for medical costs incurred when the employer waives its right to select or refuses to designate which physician the employee should go to. This issue arises because of the language used in this section:

"In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical and hospital treatment, including nursing, ambulance and medicines, as may reasonably be required for the first one hundred eighty days after the injury or disability, to cure and relieve from the effects of the injury, and thereafter such additional similar treatment as the division or the commission by special order may determine to be necessary. . . ." (Emphasis supplied)

Honorable John E. Scott

The question that may be legitimately asked is may a duly licensed chiropractor provide such ". . . medical, surgical and hospital treatment, including nursing, ambulance and medicines, . . ." so as to satisfy the employer's responsibility to his injured employee?

It is our understanding that the Missouri Division of Workmen's Compensation and Industrial Commission routinely allow reimbursement of<sup>1</sup> authorized chiropractic services rendered to employees under the Workmen's Compensation Law. Moreover, our review of cases from other jurisdictions indicate that a majority of courts have specifically allowed reimbursement for chiropractic services under workmen's compensation laws substantially the same as Missouri's. See, e.g., Tom Still Transfer Company v. Way, 482 S.W.2d 775 (Tenn. 1972); Olivarez v. Texas Employers' Insurance Association, 486 S.W.2d 884 (Tex.Civ.App. 1972); Stich v. Independent Life & Accident Insurance Company, 139 So.2d 398 (Fla. 1962); and Divito v. Fuller Brush Company, 217 So.2d 313 (Fla. 1969). But, see, contra: Ingebritson v. Tjernlund Manufacturing Company, 183 N.W.2d 552 (Minn. 1971).

Based on the foregoing considerations, it is our opinion that Chapter 287 does not prohibit the use of chiropractic services for the treatment of injured employees covered under that chapter.

Therefore, it is our view that both the employer and the insurer have a responsibility to provide medical treatment to an injured employee pursuant to Section 287.140 of the Workmen's Compensation Law. Accordingly, we believe that either the employer or the insurer has a right to select a treating physician in appropriate circumstances; and, with regard to the question of who has the paramount right of selection, such issue is best left to private resolution by mutual agreement between the respective parties.

In addition, it is our view that no provision of Chapter 287 prohibits the use of chiropractic services for treatment of injured employees covered by that chapter.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

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<sup>1</sup>For a statutory definition and analysis of what treatment a chiropractor is authorized to provide under Missouri law, see: Section 331.010, RSMo 1969, and Attorney General's Opinions No. 148, 1968; No. 32, 1953; No. 239, 1970; and No. 56, 1972.



DEPARTMENT OF SOCIAL SERVICES:  
DIVISION OF CORRECTIONS:  
CONVICTS:

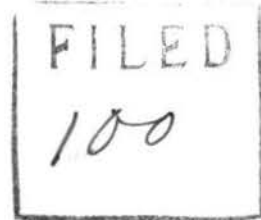
use the interest generated therefrom to pay the maintenance costs of such an account and to deposit the remainder in an inmate canteen fund.

The Division of Corrections may not deposit the personal funds of inmates in a savings account in a bank and then

OPINION NO. 100

December 14, 1976

Mr. Lawrence Graham, Director  
Department of Social Services  
Broadway State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Graham:

This is in reply to your recent request for an opinion of this office which reads as follows:

"May the Division of Corrections through its treasurer, deposit in one savings account with a bank all individual inmates' personal funds and use the interest paid thereon to offset or pay for any costs involved and the remainder of the interest deposited in the inmate canteen fund. No interest will be credited or paid to any individual account."

In order to answer this question it is necessary to discuss the manner in which personal funds of inmates are treated by Missouri statutes and by the accounting procedures of the Missouri Division of Corrections.

It is our understanding that inmates receive funds from essentially two sources. First, funds may be sent to an inmate for credit to his individual account at the prison from sources outside the institution. Second, inmates receive compensation in the form of earnings from the state for the jobs which they perform inside the institution, and these funds are credited to their inmate accounts.

Both Section 216.310, RSMo 1969 and Section 216.350, RSMo 1969, recognize the fact that personal property of an inmate within

Mr. Lawrence Graham

the custody of the institution must be returned to him. Section 216.340, RSMo 1969, states that an inmate may receive compensation for work performed inside an institution of the Division of Corrections. In addition, Section 216.345, RSMo 1969 recognizes the compensation described in Section 216.340 as the earnings of the individual inmate and directs the division of administration to place such earnings to the credit of the prisoner engaged in work at the institution.

It is our opinion that the above statutes recognize both the earnings of an inmate received from work inside the institution, and any personal funds received by an inmate from sources outside the institution, to be the personal property of the individual inmate to whose account such funds are posted by the treasurer of the Missouri Division of Corrections. Furthermore it seems apparent that the Division itself recognizes the credits posted to the various inmate accounts to be the personal property of the individual inmate.

In conversations with the treasurer of the Missouri Division of Corrections, the following information was received by this office relevant to the handling of inmate funds. Each inmate has a separate account in the treasurer's office which reflects all personal funds received by the inmate from sources both within and without the institution. Credits are posted to these individual accounts reflecting the personal funds of the inmate. A general account is maintained at a local bank described as the "Inmate Account Fund - Division of Corrections" in which the personal funds of the inmates are kept by the treasurer. This bank account contains only the personal funds of the inmates of the various institutions as reflected by the total credits posted to the inmate accounts maintained at the office of the treasurer of the Missouri Division of Corrections. The total amount of the credits to the various inmate accounts maintained by the treasurer is the same as the total amount reflected in the "Inmate Account Fund" at the bank.

The above procedure makes it clear that the Division of Corrections treats the credits posted to the individual inmate accounts, the total of which is reflected by the funds deposited in the bank account, as the personal property of the individual inmate. Of course, the use of these funds is restricted to an extent by the various institutional rules but as a general proposition they are considered to be the personal property of the inmate.



Mr. Lawrence Graham

Since the principal amount in the bank account entitled "Inmate Account Fund - Division of Corrections" reflects the sum total of the personal funds of each individual prisoner as stated in his institutional inmate account, it is our opinion that it would not be permissible for the Division of Corrections to use interest generated by such a bank account to pay for the maintenance cost thereof or to deposit the interest in a general inmate canteen fund.

Interest is merely incident to the principal and it is considered to have the same ownership as the principal by which it is produced. See Mochar Sales Company v. Meyer, 373 S.W.2d 911 (Mo. 1963); 5A Michie, Banks and Banking, §94 (1973); 47 C.J.S. Interest, §9 (1946); 45 Am.Jur.2d Interest and Usury §39 (1969). As stated by the court in State of Kansas ex rel. American Steel Works v. Hartford Accident & Indemnity Company, 426 S.W.2d 720 (K.C.Mo.App. 1968):

" . . . Interest which is due on a liquidated claim is, of course, but an incident to the principal. . . ." Id. at 725

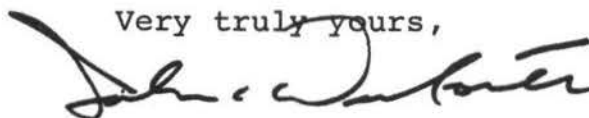
The individual inmate is entitled to that portion of the bank account which corresponds with the amount posted to his inmate account maintained by the treasurer of the Missouri Division of Corrections within the institution. Since the principal sum of the bank account merely reflects the total amount of the inmate accounts maintained within the institution, and is considered the personal property of the individual inmate, the interest generated therefrom would have to inure the benefit of the individual inmate and not to the Division of Corrections. See Laughlin v. Boatmen's Nat. Bank of St. Louis, 189 S.W.2d 974 (Mo. 1945).

#### CONCLUSION

It is, therefore, the opinion of this office that the Division of Corrections may not deposit the personal funds of inmates in a savings account in a bank and then use the interest generated therefrom to pay the maintenance costs of such an account and to deposit the remainder in an inmate canteen fund.

The foregoing opinion, which I hereby approve, was prepared by my assistant, William F. Arnet.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

APPROPRIATIONS:

DEPARTMENT OF PUBLIC SAFETY:

The Department of Public Safety has no authority to spend any of the moneys appropriated in Section 16.320, House Bill No. 16, Second Regular Session, 78th General Assembly.

OPINION NO. 101

April 29, 1976

Mr. Michael D. Garrett, Director  
Department of Public Safety  
621 East Capitol Avenue  
Jefferson City, Missouri 65101



Dear Mr. Garrett:

This is in reply to your request for an opinion of this office concerning your authority to spend moneys appropriated in Section 16.320, House Bill No. 16, Second Regular Session, 78th General Assembly.

Section 16.320 provides as follows:

". . . To the Department of Public Safety

"For contingent expenses of any type, including Personal Service, Equipment Purchase and Repair and Operation and renovation expenses except permanent capital improvements, for the purpose of reducing the number of pending felony cases in the circuit courts of Missouri; provided that all such expenditures authorized herein shall be limited to expenses of criminal justice agencies both state and local, including but not limited to the Attorney General, the Board of Probation and Parole, the Circuit Attorney of the City of St. Louis, the Sheriff of the City of St. Louis, the Prosecuting Attorney of St. Louis County and the Prosecuting Attorney of Jackson County, and provided that all such expenditures authorized herein shall not supplant federal, state or local appropriations made for the purpose stated herein.

Mr. Michael D. Garrett

"From Revenue Sharing Trust Fund. . \$600,000"

Particularly, you state that you have no legal duties or powers for any of the purposes of Section 16.320 and, therefore, are concerned as to whether you have the legal authority to spend any or all of the \$600,000 appropriated.

First, it is clear that every appropriation must specify distinctly the purpose for which moneys are to be expended. State ex inf. Danforth v. Merrell, 530 S.W.2d 209 (Mo.Banc 1975). Also, it is well established that it is unconstitutional to legislate in an appropriation bill. State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo.Banc 1934); State ex rel. Ganes v. Canada, 113 S.W.2d 783, 790 (Mo.Banc 1937), reversed on other grounds, 305 U.S. 337.

In this regard, the granting of powers can only be done by general legislation not in an appropriation bill. See, State ex rel. Hudson v. Carter, 27 P.2d 617, 624-625 (Okla. 1933). Thus, the purpose clause of an appropriation is to state to the officer or agency to whom the money is directed what use can be made of the money within the legal powers given to such officer or agency by general legislation. But, as stated, the appropriation itself cannot create the legal power to act.

In view of this, we have examined the powers of the Department of Public Safety and find no authority granted to the department to do those things listed in Section 16.320. See, Section 11, C.C.S.H.C.S.S.C.S. Senate Bill No. 1, First Extraordinary Session, 77th General Assembly.

#### CONCLUSION

Therefore, it is the opinion of this office that the Department of Public Safety has no legal authority to spend any of the moneys appropriated in Section 16.320, House Bill No. 16, Second Regular Session, 78th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

June 8, 1976

OPINION LETTER NO. 102

JOHN C. DANFORTH  
ATTORNEY GENERAL

Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Elementary and  
Secondary Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

In accordance with your request of April 26, 1976, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Title I, ESEA, Annual Program Plan, Fiscal Year Ending September 30, 1977." This application for federal funds is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended.

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto (45 C.F.R. 116, October 1, 1975 edition), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo 1973 Supp.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a state educational agency under Title I of the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto, including those arising from the assurances set forth in the application.

In addition to this opinion letter which constitutes our official certification, we have executed the form of certification attached to the Annual Program Plan.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

SUNSHINE LAW: The St. Louis Republican Central  
POLITICAL COMMITTEES: Committee is a "public governmental  
body" as defined in Section 610.010  
(2), RSMo Supp. 1975, and is therefore subject to the open meeting  
requirement of that law.

OPINION NO. 103

September 8, 1976

Honorable John A. Sharp  
State Representative, 38th District  
11320 Blue Ridge Ext.  
Kansas City, Missouri 64134



Dear Representative Sharp:

This is in reply to your request for an official Attorney General's opinion concerning the question whether the St. Louis Republican Central Committee is a "public governmental body" as defined in Section 610.010(2), RSMo Supp. 1975, and is therefore subject to the open meeting requirement of that law, commonly referred to as the "Sunshine Law".

Section 610.010(2), RSMo Supp. 1975, reads as follows:

"'Public governmental body', any constitutional or statutory governmental entity, including any state body, agency, board, bureau, commission, committee, department, division, or any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, and any other governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power;"  
(Emphasis added)

We believe the question turns on whether these committees are considered under this definition of public governmental body to have any governmental function and whether these persons would be considered as "officers". In considering this question we first note that the language of this statute is very broad and evinces an intent to make the statute applicable to meetings of governmental entities at all levels of government. Moreover, since the statute was passed in the public interest and

Honorable John A. Sharp

is remedial in nature, it must be given a liberal construction. City of St. Louis v. Carpenter, 341 S.W.2d 786 (Mo. 1961); Board of Public Instruction v. Duran, 224 So.2d 693 (Fla. 1969).

In Cohen v. Poelker, 520 S.W.2d 50, 52 (Mo. 1975), the court stated:

"The definition of 'public governmental body' refers to and includes constitutional and statutory governmental bodies or entities at all levels in the state; for example: the 'state' itself, 'any political subdivision of the state,' the 'county,' the 'municipal government,' the 'school district,' the 'special purpose district,' etc. By including in the definition any 'agency,' 'board,' 'bureau,' 'commission,' 'committee,' . . . and 'division,' the General Assembly was recognizing some of today's forms of entities through which the several levels of governmental bodies function. It is these agencies, commissions and departments and their members which have 'meetings'; not the state, county, municipality or district. Thus, it is clear that the [legislative] intent was that secrecy be prohibited at all levels of government in the state by requiring that these meetings and votes of the members of these departments, commissions and agencies of the several levels of government and the records thereof be 'open' to the public." (Emphasis added)

This definition points out that the specific listing of entities governed by the statute is a legislative recognition of the functioning of governmental entities at all levels. Therefore, determining whether a particular body or entity is a "public governmental body" involves determining whether such body is a "constitutional or statutory entity" and then if such body performs any governmental function.

Central party committees are provided for in Sections 120.750 through 120.840, RSMo, and therefore the St. Louis Republican Central Committee is a "statutory entity."

As to whether such committee exercises any governmental function, the general purpose of the committee is to represent and act for the party in the interim between conventions. Section 120.750.1, RSMo 1969. The committee directs the operation



Honorable John A. Sharp

of the party on a daily basis and has the power to fill vacancies on the committee. Sections 120.750.1 and 120.787, RSMo 1969. In addition, the committee is responsible for electing members to district committees. Section 120.800, RSMo 1969.

In considering whether a committeewoman under such statutes is a public officer, the Supreme Court of Missouri in Noonan v. Walsh, 273 S.W.2d 195 (Mo. 1954), held as follows:

"A committeewoman for a political party is elected under statutes enacted by General Assembly and is charged with duty of performing certain functions of government, and is, therefore, a 'public officer'". (Emphasis added)

Thus, the court has made it clear that governmental functions are performed under these statutes, and, accordingly, it is our opinion that such committees are governmental entities under the Sunshine Law and the meetings of such committees must be open to the public.

We note that the Supreme Court held in State ex rel. Wright v. Carter, 319 S.W.2d 596, that the office of party committeeman was not within a statute requiring the filing of a statement of campaign expenses in connection with the election of a committeeman to office and that the Kansas City Court of Appeals held in Shaver v. Moyer, 324 S.W.2d 148 (Mo.App. 1959) that members of the central committee of a city were not required to be elected in accordance with general election laws.

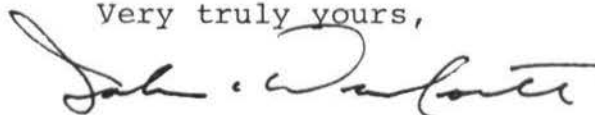
However, it is our view that the holding of the Supreme Court in the Noonan case, supra, is decisive in the premises and that a meeting of the members of a party political committee is a meeting of a public governmental body within the meaning of the Sunshine Law.

#### CONCLUSION

It is the opinion of this office that the St. Louis Republican Central Committee is a "public governmental body" as defined in Section 610.010(2), RSMo Supp. 1975, and is therefore subject to the open meeting requirement of that law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

May 5, 1976

OPINION LETTER NO. 104

Klaffenbach

Honorable James C. Kirkpatrick  
Secretary of State  
State of Missouri  
Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared a ballot title for Senate Joint Resolution No. 40, 78th General Assembly, Second Regular Session. The ballot title is:

Repeals provision of Missouri Constitution which provides "Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law."

Very truly yours,

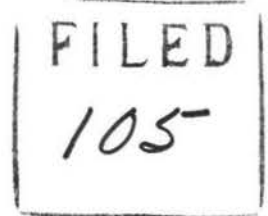
JOHN C. DANFORTH  
Attorney General



May 5, 1976

OPINION LETTER NO. 105  
Answer by Letter - Klaffenbach

Honorable James C. Kirkpatrick  
Secretary of State  
State of Missouri  
Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared a ballot title for Senate Joint Resolution No. 23, 78th General Assembly, Second Regular Session. The ballot title is:

"Amends Missouri Constitution to authorize legislature to rescind administrative rules and regulations of agencies by concurrent resolution without presentation to the governor."

Very truly yours,

JOHN C. DANFORTH  
Attorney General

May 5, 1976

OPINION LETTER NO. 106  
Answer by Letter - Burns

Honorable James C. Kirkpatrick  
Secretary of State  
State of Missouri  
Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared a ballot title for Senate Joint Resolution No. 29, 78th General Assembly, Second Regular Session. The ballot title is:

"Authorizes counties to issue utility or airport revenue bonds with voter approval; authorizes counties and municipalities to issue industrial development revenue bonds without voter approval."

Very truly yours,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

May 25, 1976

OPINION LETTER NO. 107

JOHN C. DANFORTH  
ATTORNEY GENERAL

Mr. James R. Spradling, Director  
Department of Revenue  
4th Floor, Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Mr. Spradling:

This letter is in response to your opinion request asking as follows:

"Must a delinquency penalty fee, as provided by Section 301.190, Sub. 3, RSMo 1969, be assessed against new Missouri residents who fail to apply for a Missouri title within thirty days from the date they establish Missouri residency on motor vehicles owned previously in another state?"

Section 301.190, subsection 3, RSMo, states in pertinent part:

". . . If application for the certificate is not made within thirty days after the vehicle is acquired by the applicant, a delinquency penalty fee of five dollars for each month or part of a month of delinquency, not to exceed a total of twenty-five dollars, shall be imposed. . . ."  
(Emphasis added)

Similar language is used in subsection 1 of Section 301.190, RSMo, in that the provisions of that section provide in part:

". . . Application shall be made within thirty days after the applicant acquires

Mr. James R. Spradling

the motor vehicle upon a blank form furnished by the director of revenue . . ."  
(Emphasis added)

Section 1.090, RSMo, provides that words and phrases shall be taken in their plain and ordinary and usual sense with the exception of technical words and phrases. The word "acquire" as used in subsection 3 has an ordinary meaning which is generally to become the owner of property, or, less generally, to become the lessee of property. Ballentine's Law Dictionary, 2nd Edition, 1948, page 18.

In addition, it appears that subsection 3 is penal in nature; and it is a settled rule of construction that penal statutes are to be strictly construed so that matters and things which are not clearly included cannot be brought within the operation of such statutes by construction. State v. Reid, 28 S.W. 172 (Mo. 1894).

We therefore conclude, in answer to your question, that subsection 3 is not applicable to applications for certificates of ownership by new residents who wish to obtain a Missouri title on vehicles previously licensed in other states.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

May 25, 1976

OPINION LETTER NO. 108  
Answer by letter-Klaaffenbach

Honorable Omar Schnatmeier  
Representative, District 52  
1901 Elm Street  
St. Charles, Missouri 63301



Dear Representative Schnatmeier:

This letter is in response to your opinion request asking as follows:

"Does the City of St. Charles possess the necessary power or authority to enter into an agreement or join with St. Charles County in order to establish a joint police-sheriff's facility?"

You also state that:

"The City of St. Charles and St. Charles County are studying the possibility of establishing and constructing a joint police-sheriff's facility. The facility would include the administrative offices of both the police department and sheriff's department, a combined photo lab, a combined communications center, joint fingerprinting facilities, and joint maintenance of the facility. Also to be included would be a county jail and separate police holdover."

We believe that the opinions which are enclosed answer your question. In Opinion No. 475 dated October 20, 1970, to Honorable Peter H. Rea, this office concluded that a sheriff of a third class county with the approval of the county court may enter into a co-operative agreement for the operation of a common dispatch service for the peace officers of the county and contracting municipalities.

Honorable Omar Schnatmeier

In Opinion No. 258 dated November 4, 1963, to Honorable Omer H. Avery, this office concluded that municipalities may enter into cooperative agreements for common police protection.

We have also enclosed Opinion No. 366 dated December 18, 1969, to Honorable Jack E. Gant, in which we held that a sheriff has the duty to enforce the laws of the state throughout his county and, therefore, a city cannot contract with him to provide such services for the city. The last cited opinion would at first glance appear to be in conflict with the other opinions. However, it is clearly distinguishable on the stated basis that the sheriff could not contract to do that which he was already required to do under the law.

Therefore, in answer to your question, it is our view that the City of St. Charles and St. Charles County have the authority to establish a joint police-sheriff's facility as contemplated under the provisions of Sections 70.210, et seq., RSMo.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 475, Rea, 10-20-70  
Op. No. 258, Avery, 11-4-63  
Op. No. 366, Gant, 12-18-69  
Op. No. 63, Moore, 3-27-57  
Op. No. 213, Cantrell, 5-15-63  
Op. No. 50, Keeler, 2-22-68  
Op. No. 237, Parker, 11-14-68  
Op. No. 23, Kuhlman, 1-21-70  
Op. No. 296, Brandom, 8-21-70  
Op. No. 530, McKenzie, 12-10-70



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
JEFFERSON CITY

May 25, 1976

OPINION LETTER NO. 109

Honorable James C. Kirkpatrick  
Secretary of State  
State of Missouri  
Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared a ballot title for Senate Joint Resolution No. 24, 78th General Assembly, Second Regular Session.

The ballot title is:

Changes authority and jurisdiction of Supreme Court, Courts of Appeal and circuit courts; abolishes all other courts; creates associate circuit judges; amends nonpartisan court plan; amends judges retirement provisions; abolishes constables and St. Louis City prosecuting attorney; municipal courts become divisions of circuit courts.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

COUNTY JUDGE:  
COUNTY OFFICERS:

A presiding judge of a county of the first class not having a charter form of government and not containing all or part of a city having a population of five hundred thousand inhabitants is required to devote his full time to the duties of his office under Section 49.080, RSMo Supp. 1975, but that such requirement does not mean that such officer is precluded from having other after-hours employment where such other employment does not conflict with, impair, or interfere with the performance of such officer's duties as presiding judge. County officers do not hold "part time" positions. They are required by law to personally devote their time to the performance of the duties of their offices. However, consistent with this requirement and unless otherwise prohibited by law, county officers may occupy other offices and engage in other activities which are compatible and not in conflict.

OPINION NO. 110

June 7, 1976

Honorable James M. Kelly  
Prosecuting Attorney  
Greene County  
Suite 206, Courthouse  
Springfield, Missouri 65802



Dear Mr. Kelly:

This opinion is in response to your question asking as follows:

"May the presiding judge of the county court of a county of the first class not having a charter form of government and not containing all or part of a city having a population of five hundred thousand inhabitants, hold a second job during hours when the courthouse is not open?"

"If so, what effect and meaning do the words 'shall devote his full time to the duties of his office' have as contained in Sec. 49.080 (2) RSMo as amended by Laws 1973? May officeholders of like counties described herein, whose offices are not covered by the above restriction, hold second jobs during hours when the courthouse is open?"



Honorable James M. Kelly

You further state:

"It has come to the attention of this office that the presiding judge of the Greene County Court is employed by Drury College in Springfield, Missouri, as an instructor during the evening hours. At no time does he conduct such classes during what is considered normal courthouse business hours, i.e. 8:00 AM to 5:00 PM, Monday through Friday. There exists no known conflict at this time between his duties as presiding judge and duties as college instructor. The presiding judge is of the opinion that the words 'shall devote his full time to the duties of his office' apply only to the hours of the day when the courthouse is open and is thus satisfied by working the normal 40 hour work week. If this view is correct, this office is concerned with the effect on other elected county officials in Greene County who are not covered by such a restriction, e.g. auditor, treasurer, associate county judges, and others. Are they part time employees of the county? May they hold a second job during hours when the courthouse is open?"

Subsection 2 of Section 49.080, RSMo Supp. 1975, provides that the presiding judge in counties of the first class not having a charter form of government and which do not contain all or a part of a city having a population of at least five hundred thousand inhabitants shall devote his full time to the duties of his office.

In our Opinion No. 130 dated March 22, 1966, to Sloan, we stated our conclusion with respect to a similar provision regarding juvenile officers. A copy of that opinion is enclosed and is self-explanatory. We believe that the same reasoning is applicable and that the opinion answers your first question.

We believe that our Opinion No. 85 dated January 4, 1938, to Stark answers your second question. A copy of that opinion is enclosed and is self-explanatory. It should be pointed out for clarification that this opinion quoted from the provisions of Section 18 of Article II of the 1875 Constitution of Missouri. Such section was omitted when the 1945 Constitution was enacted. However, the statutory provision now designated as Section 106.220, RSMo

Honorable James M. Kelly

1969, which provides that any county, city, town, or township officer, except such officers as may be subject to removal by impeachment, ". . . who shall fail personally to devote his time to the performance of the duties of such office, . . ." is subject to forfeiture of office is still applicable. In this respect see also State ex inf. Taylor v. Cumpton, 240 S.W.2d 877 (Mo.Banc 1951).

We also enclose Opinion Letter No. 87 dated May 6, 1976, to Lynn, which is self-explanatory.

In summary and in direct response to your question, we are of the view that the requirement of Section 49.080 that the presiding judge devote "full time" to the duties of his office does not mean that he may not hold any other position or engage in any other activity, but does mean that he cannot hold another position with conflicting work hours or engage in other activities which would impair his ability to faithfully perform his duties. Under the facts that you have given us, the individual apparently does devote his normal working day to his duties as presiding judge of the county court and apparently his work as an instructor at the college does not impair or interfere with his ability to faithfully perform his duties as presiding judge. In these premises, it is our view that the "full time" requirements of Section 49.080 are met. You have stated in your opinion request that the presiding judge holds the view that the "full time" requirement of the statute is met if he devotes forty hours per week to the performance of his official duties. We do not hold that the "full time" requirement of the statute is met if a presiding judge devotes only forty hours per week to his job if more than forty hours is required to properly perform the duties of the office.

Further, with respect to other county officers, it is our conclusion that such offices cannot be denominated "part time" positions because that would leave the inference that something less than proper performance of the duties of such offices is required. As we have noted, the law requires that county officers personally devote their time to the duties of their office and are subject to forfeiture of office if they do not do so. Such a requirement does not mean, however, that such officers need to devote all of their time to the offices they hold. They are required to do whatever is necessary for the proper performance of their duties. Clearly each case must be decided on its own merits.

#### CONCLUSION

It is the opinion of this office that a presiding judge of a county of the first class not having a charter form of government and not containing all or part of a city having a population of

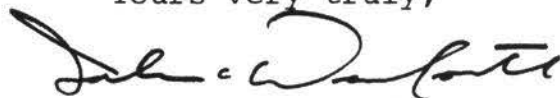
Honorable James M. Kelly

five hundred thousand inhabitants is required to devote his full time to the duties of his office under Section 49.080, RSMo Supp. 1975, but that such requirement does not mean that such officer is precluded from having other after-hours employment where such other employment does not conflict with, impair, or interfere with the performance of such officer's duties as presiding judge.

County officers do not hold "part time" positions. They are required by law to personally devote their time to the performance of the duties of their offices. However, consistent with this requirement and unless otherwise prohibited by law, county officers may occupy other offices and engage in other activities which are compatible and not in conflict.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 130  
3-22-66, Sloan

Op. No. 85  
1-4-38, Stark

Op. Ltr. No. 87  
5-6-76, Lynn

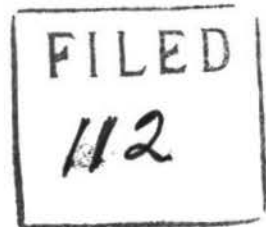
INSURANCE:

1. Insurance companies are required to pay a filing fee pursuant to Section 374.230(6), RSMo, for documents filed with the Director of the Division of Insurance pursuant to Sections 376.405, 376.675, 376.777, RSMo 1969 and Section 379.321, RSMo 1975 Supp.; 2. The filing fee imposed by Section 374.230(6) is for each document and not each page of each document; and 3. The filing fee paid pursuant to Section 374.230(6) is not, pursuant to Section 148.400, deductible from the premium tax payable by such companies.

OPINION NO. 112

June 21, 1976

Mr. H. W. Edmiston  
Director, Division of Insurance  
515 East High Street  
Jefferson City, Missouri 65101



Dear Mr. Edmiston:

This is in response to your opinion request on the following questions:

1. Does Section 374.230(6), RSMo 1969 require insurance companies to pay a ten dollar filing fee for each item required to be filed by Sections 376.405, 376.675, 376.777, RSMo 1969 and Section 379.321, RSMo 1975 Supp.?

2. To the extent that the answer to the first question is in the affirmative, is the ten dollar filing fee imposed with respect to each page of each document filed?

3. To the extent that the answer to the first question is in the affirmative, is an insurance company entitled to a credit pursuant to Section 148.400, RSMo 1969 on the premium tax it pays for the filing fees which it pays pursuant to Section 374.230(6)?

Section 374.230(6), RSMo 1969, provides:

"Every insurance company doing business in this state shall pay to the collector of revenue the following fees:

Mr. H. W. Edmiston

\* \* \*

"(6) For filing any other paper required to be filed in the office of the superintendent, [director of the Division of Insurance] ten dollars each;"

Sections 376.405, 376.675, 376.777 and 379.321 require insurance companies to file various policy forms and other documents with the Director of Insurance as a condition of engaging in certain types of business. Thus, insurance companies are required by Section 374.230(6) to pay the filing fee mandated by that section with respect to such filings.

The word "paper" can mean "document". We believe the word paper was used in that sense in Section 374.230(6). Therefore the fee is not imposed with respect to each physical page of the document that an insurance company files with the director.

With regard to your final question, Sections 148.320 through 148.400, RSMo 1975 Supp. impose a premium tax on insurance companies doing business in this state. Section 148.400 allows deductions from the premium tax payable for "income taxes, franchise taxes, personal property taxes, valuation fees, registration fees and examination fees". It is obvious that the filing fee imposed by Section 374.230(6) is not an income tax, franchise tax or personal property tax. Nor, for reasons set forth below, are such fees valuation fees, registration fees or examination fees.

Section 148.400 is in the nature of a tax exemption. It is generally recognized tax exemption statutes will be strictly construed against the taxpayer. The terms "valuation fees, registration fees and examination fees" have precise meaning when reference is made to other statutory sections. Examination fees are assessed by the director pursuant to Section 374.200, RSMo 1969 for examinations made by the director pursuant to Section 374.190. Valuation fees are imposed by Sections 374.200 and 374.230(1). Registration fees are imposed on insurance companies by Section 351.125, RSMo 1975 Supp. Based on the foregoing it would appear that the terms "valuation fees", "examination fees" and "registration fees" as used in Section 148.400, RSMo 1969, refer to specific statutory fees. Such statutory fees do not include the fees imposed by Section 374.230(6) for filing documents. Therefore, the filing fees paid by insurance companies pursuant to Section 374.230(6) are not deductible pursuant to Section 148.400 from the premium tax payable by insurance companies.

Mr. H. W. Edmiston

CONCLUSION

It is the opinion of this office:

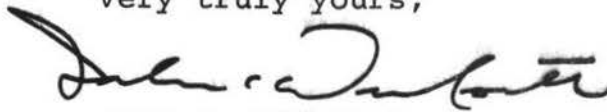
1. Insurance companies are required to pay a filing fee pursuant to Section 374.230(6), RSMo for documents filed with the Director of the Division of Insurance pursuant to Sections 376.405, 376.675, 376.777, RSMo 1969 and Section 379.321, RSMo 1975 Supp.;

2. The filing fee imposed by Section 374.230(6) is for each document and not each page of each document; and

3. The filing fee paid pursuant to Section 374.230(6) is not, pursuant to Section 148.400, deductible from the premium tax payable by such companies.

The foregoing opinion which I hereby approve was prepared by my assistant, Charles A. Blackmar.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



July 28, 1976

OPINION LETTER NO. 113



Dr. Arthur L. Mallory  
Commissioner  
State Department of Elementary  
and Secondary Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Commissioner Mallory:

In accordance with your request of May 26, 1976, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Application for Federal Assistance - Migrant Education Program (fiscal year 1977)." This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended. See 20 U.S.C. Section 241e(c)(1).

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto (45 C.F.R. 116, October 1, 1975 edition), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo 1973 Supp.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a "state educational agency" as defined in Title I of Public Law 89-10 (20 U.S.C. Section 244), including those arising from the assurances set forth in the application.

Dr. Arthur L. Mallory

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Very truly yours,

JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
JEFFERSON CITY

August 4, 1976

OPINION LETTER NO. 114

Dr. Arthur L. Mallory, Commissioner  
Department of Elementary and Secondary  
Education  
Jefferson Office Building  
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's Annual Program Plan for the Consolidation of Libraries and Learning Resources, Educational Innovation and Support under Title IV of the Elementary and Secondary Education Act of 1965, as amended by Public Law 93-380 (1974), 20 U.S.C., Section 1801, et seq.

Our review has taken into consideration Title IV of the Elementary and Secondary Education Act of 1965, as amended; the applicable federal regulations (40 Fed.Reg. 53482-53503, November 18, 1975); Article III, Section 38 (a) and Article IX, Section 2 (a), Missouri Constitution.

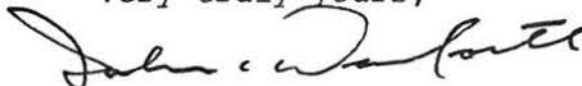
It is the opinion of this office that:

1. The Missouri State Board of Education is the "state educational agency" required by Section 403 (a) (1), P.L. 93-380 (1974), to have authority to act as the sole agency to submit the annual program plan.
2. The Missouri State Board of Education has authority under state law to carry out or arrange for the carrying out of the programs described in the annual program plan.

Dr. Arthur L. Mallory, Commissioner  
Opinion Letter No. 114  
Page Two

3. All annual program plan provisions with respect to the use of funds under Title IV can be carried out in this state.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

June 28, 1976

JOHN C. DANFORTH  
ATTORNEY GENERAL

OPINION LETTER NO. 115

Mr. Lawrence L. Graham, Director  
Department of Social Services  
Broadway State Office Building  
Jefferson City, Missouri 65101

Dear Mr. Graham:

This opinion letter is in response to your inquiry whether the Division of Family Services of the Department of Social Services can implement by administrative regulations all of the new eligibility requirements for full state participation in the federal aid-to-families-with-dependent-children program or whether legislative authorization is needed to implement some or all of these requirements.

Public Law 93-647, as amended by Public Law 94-88, contains new eligibility requirements which must be satisfied by states desiring to receive federal aid-to-families-with-dependent-children funds. Most significantly, new Title IV-D of the Social Security Act mandates that each state establish an effective child support enforcement program as a prerequisite to receiving full federal funding of the state's aid-to-families-with-dependent-children program.

The Secretary of the Department of Health, Education, and Welfare granted Missouri a waiver of compliance with the new eligibility requirements in order to permit the General Assembly at the last session to pass the necessary enabling legislation. This waiver expires June 30, 1976. During the last session of the Missouri General Assembly, the bills embodying the statutory amendments which would authorize Missouri to implement the new eligibility requirements failed to pass. Therefore, we have been advised by federal officials and your staff that the financial penalties provided for in Public Law 93-647 almost certainly will be imposed upon the State of Missouri for being out of compliance with the new eligibility requirements.

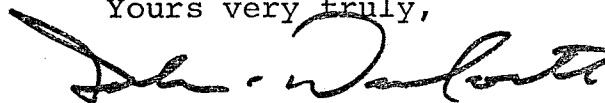
Mr. Lawrence L. Graham

Based on our review of the provisions of Public Law 93-647, as amended by Public Law 94-88, and based on our discussions with representatives of the Department of Health, Education, and Welfare and on our discussions with members of your department, we are convinced that all requirements of Public Law 93-647 must be complied with by the State of Missouri to avoid the risk of incurring the substantial financial penalties which are authorized by the Act to be imposed against any state which is out of compliance.

It is our belief that all of the requirements of Public Law 93-647, as amended by Public Law 94-88, cannot be implemented by the Department of Social Services or the Division of Family Services through administrative regulations without the passage of additional legislation by the General Assembly. For instance, we do not believe that, under Sections 208.190 and 207.020(5), RSMo 1969, and under Riggs v. Department of Public Health and Welfare, 483 S.W.2d 769 (Mo.Ct.App. at K.C. 1972), the Division of Family Services could by regulation provide for the appropriations necessary to finance implementation of the eligibility requirements of Public Law 93-647, as amended. Also, the Division could not by regulation provide for the locator services required by the federal law since such locator services cannot be furnished under state law, Section 208.045, RSMo, unless the children are receiving public assistance.

Therefore, we conclude that without legislation the State of Missouri cannot implement all of the eligibility requirements of Public Law 93-647, as amended by Public Law 94-88.

Yours very truly,



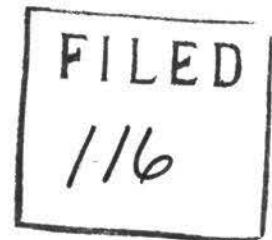
JOHN C. DANFORTH  
Attorney General

COUNTY COURT: Under Section 49.070, RSMo, a majority of  
COUNTY JUDGES: the judges of the county court constitute  
a quorum to transact business; and it is  
only when one associate judge is absent and the presiding judge and  
one associate judge are sitting for the transaction of business and  
they disagree on the matter submitted to them that the decision of  
the presiding judge shall stand as the decision of the court.

OPINION NO. 116

June 25, 1976

Mr. Theodore L. Johnson, III  
Greene County Counselor  
1002 Plaza Towers  
Springfield, Missouri 65804



Dear Mr. Johnson:

This is in response to your request for an opinion from this  
office as follows:

"A question has arisen from action in the Greene County Court. On Thursday or Friday, May 20 or 21, the Presiding Judge of Greene County announced that he would call up for action a particular matter pending in the County Court. The matter was subsequently called up by Judge Squibb on the court day of May 24, 1976. At that time, one of the Associate Judges declared that he was not ready to vote on the issue and wanted time to consider the matter. The issue then is whether or not Section 49.070 cited above would apply in this case and therefore give the Presiding Judge two votes, or the power to decide the issue, with the other Associate Judge and the Presiding Judge sitting in a determination of the question. Essentially, then, if an Associate Judge were to decide that he was not in a position to vote on a particular matter, would that, therefore, give the Presiding Judge the right to decide the matter (if you assume the other Associate Judge would oppose the stand of the Presiding Judge.)"

Mr. Theodore L. Johnson, III

As we understand the facts, the presiding judge and two associate judges who comprise the county court were present and sitting when this action was taken.

It is our further understanding that the judge did not disqualify himself for cause but simply declined and refused to vote. If a judge disqualifies himself for cause, it is the same as if he is not sitting. See Opinion No. 200 rendered May 20, 1969, to William C. Batson, Jr., a copy of which is enclosed.

Section 49.070, RSMo, to which you refer, provides as follows:

"A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent; when but two judges are sitting and they shall disagree in any manner submitted to them, the decision of the presiding judge shall stand as the decision of the court; provided further, when the presiding judge is absent and the other two judges are present the county clerk shall designate one of such judges present as presiding judge during the absence of the regular presiding judge; and such judge shall, during the absence of the regular presiding judge, have all of the powers of the regular presiding judge."

County courts are not the general agents of the counties or the state; their powers being limited and defined by law and having only such authority as expressly granted them by statute. King v. Maries County, 249 S.W. 418 (Mo. 1923). A county court performs its functions as a constituted body, and its members acting individually have no power to obligate the county. Missouri-Kansas Chemical Co. v. Christian County, 180 S.W.2d 735 (Mo. 1944). Carter v. Reynolds County, 288 S.W. 48 (Mo. 1926).

It is our view that Section 49.070 applies only when two of the county court judges are present and are sitting as the court for the transaction of business before the court. The word sitting, as used in this statute, means the actual presence of the judge meeting with the other members of the court for the purpose of transacting business of the county. When all the judges of the court are present, the mere fact that one of the judges, while meeting with the court for the transaction of business, does not vote on a proposition being submitted

Mr. Theodore L. Johnson, III

to the court, does not mean that he should not be considered as a member of the court at the time or as not sitting as required under Section 49.070 and thus allow the decision of the presiding judge to stand as the decision of the court.

#### CONCLUSION

It is the opinion of this office that under Section 49.070, RSMo, a majority of the judges of the county court constitute a quorum to transact business; and it is only when one associate judge is absent and the presiding judge and one associate judge are sitting for the transaction of business and they disagree on the matter submitted to them that the decision of the presiding judge shall stand as the decision of the court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 200  
Batson, 5-20-69

June 4, 1976

OPINION LETTER NO. 117  
Answer by letter-Burns

Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared a ballot title for a constitutional amendment proposed by initiative petition. The ballot title is:

"Authorizes enactment of laws providing (1) services for the handicapped, (2) nonreligious textbooks, and (3) transportation for all public and nonpublic elementary and secondary school children."

Yours very truly,

JOHN C. DANFORTH  
Attorney General



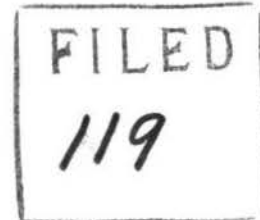
DEPARTMENT OF CORRECTIONS:  
CONVICTS:  
CITIZENSHIP:  
MARRIAGE:  
DIVORCE:

A marriage entered into by an inmate, while under sentence to the Missouri Department of Corrections, is valid if entered into pursuant to the law of Missouri, particularly Chapter 451, RSMo 1969, and may be dissolved in accordance with Chapter 452, RSMo Supp. 1975.

OPINION NO. 119

November 5, 1976

Honorable John J. Blassie  
Representative, 98th District  
4400 Oleatha  
St. Louis, Missouri 63116



Dear Representative Blassie:

This official opinion is issued in response to your request for a ruling. In your opinion request you ask:

"Under Section 222.010 as stated give the definite interpretation that anyone convicted and sentenced to a life term for a felony, loses all civil rights, and in the case of a life term is considered civilly dead. My question, then, is what is the status of a marriage involving a prisoner serving a life term contracted during the period of his incarceration - is the marriage valid?

"If such a marriage is legal, what steps should be taken by either of the participants to dissolve the marriage? Also, how can an official of the State permit such a marriage to be performed if it is in violation of Section 222.010?"

As is apparent from your opinion request, the answer depends upon an interpretation of Section 222.010, RSMo 1969. That statute reads as follows:

"A sentence to imprisonment in an institution within the state department of corrections for a term less than life suspends all

Honorable John J. Blassie

civil rights of the persons so sentenced during the term thereof, and forfeits all public offices and trusts, authority and power; and the person sentenced to imprisonment for life shall thereafter be deemed civilly dead."

Insofar as Section 222.010 purports to suspend the civil rights of a person sentenced to the Missouri Department of Corrections, it has been declared unconstitutional by the United States District Court for the Western District of Missouri in Thompson, et al v. Bond, et al., No. 74 CV 91-C. This decision was filed October 15, 1976, and has not, at the time of the preparation of this opinion, been reported.

This federal court decision declares unconstitutional only those portions of the statute which suspend the civil rights of inmates serving a term of years and which declare that inmates serving life sentences are deemed civilly dead. The portion of the statute which requires forfeiture of public office and trust remains in effect.

Prior to the Thompson decision, a question existed as to whether an individual could validly enter into marriage while in the custody of the Missouri Department of Corrections. Section 222.010 does not cast any doubt on the validity of a marriage entered into before one or both of the spouses were sentenced to the Department of Corrections. Likewise, Section 222.010 never has been thought to raise a question as to the validity of a marriage entered into following the completion of the service of a sentence.

In any event, the decision of the three-judge panel in Thompson removes whatever question may previously have existed because of the operation of Section 222.010 as to the validity of a marriage entered into by an individual while under sentence to the Department of Corrections. Marriages entered into by inmates under sentence, as long as they comply with the statutes regarding marriage (Chapter 451, RSMo 1969), are now as valid as any other marriage entered into in the State of Missouri. These marriages can be dissolved pursuant to the procedures for dissolving marriages found in Chapter 452, RSMo Supp. 1975.

#### CONCLUSION

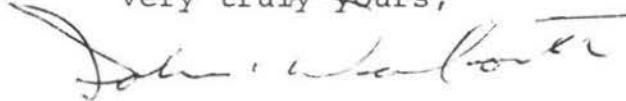
Therefore, it is the opinion of this office that a marriage entered into by an inmate, while under sentence to the Missouri

Honorable John J. Blassie

Department of Corrections, is valid if entered into pursuant to the law of Missouri, particularly Chapter 451, RSMo 1969, and may be dissolved in accordance with Chapter 452, RSMo Supp. 1975.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Preston Dean.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth", written over a horizontal line.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

July 12, 1976

OPINION LETTER NO. 120

Mr. James L. Wilson, Director  
Department of Natural Resources  
12th Floor, Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Mr. Wilson:

This opinion is in response to your request concerning whether real property in Crawford County known as "Dillard Mill" is exempt from state and local taxes.

Dillard Mill consists of three parcels of property containing approximately 130 acres. The property is owned by the L-A-D Foundation, Inc. (hereinafter referred to as L-A-D), and is operated as an historical site by the Department of Natural Resources under a land use lease agreement dated December 1, 1975. The lease terms generally provide that the Department of Natural Resources will manage the property for public use for educational, historic, scientific, recreational, and aesthetic purposes. The basic rent is one dollar (\$1.00) per year. One term provides that the Department of Natural Resources will pay additional rent to L-A-D sufficient to reimburse L-A-D for any taxes levied on the property.

We understand your concern to be whether or not the property is tax exempt regardless of the lease with the Department of Natural Resources. The lease is significant only because of the additional rent provision which would require the Department of Natural Resources to expend funds if the property is considered non-exempt.

Exemption from taxes depends on Article X, § 6, Missouri Constitution, and Chapter 137, RSMo. Paraclete Manor of Kansas City v. State Tax Commission, 447 S.W.2d 311, 313 (Mo. 1969). Section 137.110(5) states:

Mr. James L. Wilson

"The following subjects are exempt from taxation for state, county or local purposes:

\* \* \*

(5) All property, real and personal, actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes;"

A charitable use tax exemption depends upon the purposes of the organization and the use made of the property involved. Each claim rests upon the particular facts of that case. Paraclete Manor of Kansas City, supra; Frisco Employees' Hospital Association v. State Tax Commission of Missouri, 381 S.W.2d 772, 774 (Mo. 1964).

The first element to consider is the purpose of the organization. L-A-D is a not-for-profit corporation incorporated in Missouri in 1962. Its purposes, contained in Section 5 of the Articles of Incorporation, are stated as follows:

"The purposes for which the corporation is organized are charitable and scientific, and not for private profit or gain. For these purposes, it may hold, use, and expend such moneys, properties, and assets (including, but not limited to, real estate in Missouri or elsewhere) and reasonably accumulate them and any income thereon to be so used and expended in the future, for the relief of want, need, and distress, and the advancement, promotion, and encouragement of education, letters and science, both experimental and speculative. It may expend or use assets to study, preserve, provide, maintain, promote, and otherwise with relation to, forests and other natural resources, natural and recreational areas. It may expend funds for any of its purposes directly,

Mr. James L. Wilson

or indirectly by giving them to others exclusively for any one or more of its purposes. It shall not, however, expend or use any of its funds or assets in or for propaganda or to influence legislation or any election to any public office."

Section 6 provides:

"In the event of dissolution of the corporation, all assets and property remaining after all liabilities and obligations of the corporation have been paid, satisfied, and discharged, or adequate provision made therefor, shall be distributed to such non-profit organizations organized and operated exclusively for similar exempt purposes or having exemption from Federal income tax under Section 501(c)(3) of the 1954 Internal Revenue Code or a corresponding provision of prior or subsequent law, or to the Federal Government, state or local government, for a public purpose, as the then Board of Directors may determine."

L-A-D presently owns the following tracts of property in Missouri:

The Narrows, 258 acres, Texas County  
Clifty Natural Bridge, 230 acres, Maries  
County  
Dripping Springs, 8.59 acres, Texas County  
Hickory Creek Canyon, 420 acres, Ste.  
Genevieve County  
Horseshoe Bend, 222 acres, Texas County  
Grand Gulf, 150 acres, Oregon County  
Cave Springs, 172.55 acres, Shannon County  
Pioneer Natural Area, 20 acres, Shannon  
County  
Rocky Petroglyph Tract, 192 acres, Monroe  
County  
Dillard Mill, 130 acres, Crawford County  
Current and Jacks Fork River Frontage, 961  
acres, Shannon and Carter Counties

Counsel for L-A-D has informed us that all property, with two exceptions, was donated to L-A-D by Leo A. Drey. The Rocky Petroglyph Tract was purchased directly by L-A-D with funds donated by Mr. Drey. Dillard Mill was purchased directly by L-A-D.

Mr. James L. Wilson

In addition to the land use lease agreement with the Department of Natural Resources for Dillard Mill, L-A-D has entered into similar land use agreements with the Conservation Commission for the following tracts: Clifty Natural Bridge, The Narrows, Rocky Petroglyph, Dripping Springs, Horseshoe Bend, and Hickory Creek Canyon.

In addition, L-A-D is presently negotiating with the National Park Service for acceptance of ownership of Grand Gulf and classification of it as a National Monument. It is also contemplating an outright gift of Cave Springs to the National Park Service.

The Pioneer Natural Area is presently supervised by the University of Missouri (School of Forestry, Fisheries, and Wildlife) for scientific research purposes on behalf of the Society of American Foresters.

The remaining property held by L-A-D, along the Current and Jacks Fork Rivers, is held subject to a scenic easement in favor of the federal government for the public benefit and donation of the remaining interest is contemplated in the future.

L-A-D has also expended funds for a State of Missouri Natural Area inventory and for funding of the St. Louis Environmental Media Center in cooperation with Webster College. The purpose of the Center is for production of environmental educational material and services.

Also, the Internal Revenue Service has granted L-A-D tax exempt status for federal income tax purposes, pursuant to Section 501(c)(3) of the Internal Revenue Code.

We are aware that federal income tax exemption is not a persuasive factor for consideration of this question. Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365, 375 (Mo. 1969). The fact that L-A-D is organized by authority contained in Chapter 355, RSMo (General Not For Profit Corporation Law), and is authorized to operate only for charitable and scientific purposes pursuant to its Articles of Incorporation is also not controlling. Opinion No. 172, Lawson, dated March 17, 1966 (copy enclosed). However, these factors do reflect on the nature and purposes of L-A-D. Matanuska-Susitna Borough v. King's Lake Camp, 439 P.2d 441, 446 (Alaska 1968).

The second factor involves the actual use of the property in question. L-A-D acquired the Dillard Mill property in December, 1974, for the purpose of preserving the historical, educational, scientific, and natural value of the property for public use. The lease agreement entered into with the Department of Natural Resources

Mr. James L. Wilson

to manage and preserve the property reflects that intent. Members of your staff have informed us that the property will be operated primarily as an historic site, and facilities for recreation and nature appreciation will also be available. A review of correspondence between L-A-D and the Department of Natural Resources indicates that the Department of Natural Resources intends to contribute minimal improvement to the property. The plan includes construction of three picnic areas (with tables and grills), a parking area for visitors, latrines, and nature trails. Several existing cabins will be removed.

The use of property for recreational and educational purposes comes within the definition of purposes "purely charitable." St. Louis Council, Boy Scouts of America v. Burgess, 240 S.W.2d 684, 687 (Mo.Banc 1951); Jewish Community Centers Association v. State Tax Commission, 520 S.W.2d 23 (Mo. 1975); City of St. Louis v. State Tax Commission, 524 S.W.2d 839, 845 (Mo.Banc 1975). Matanuska-Susitna Borough, supra. Opinion No. 270, Drake, dated May 14, 1968; Opinion No. 28, Fisher, dated December 20, 1935.

The case of St. Louis Council, Boy Scouts of America, supra, is particularly instructive. It held that property was considered used for charitable purposes when the use involved preserving property in a natural state for the scouting activities by the Boy Scouts. The court observed at page 687:

"Does the evidence show that the present user of the Beaumont Reservation brings it within the exemption statute? The evidence does not show that the entire acreage is actually occupied at all times, and we do not believe it necessary that it should in order that it be exempt. User to that extent would destroy the very purpose for which it is operated. Nature and wild life study and its use for out-of-doors living and hiking would then of necessity be abandoned. It would have reached a point where it could not be so used--'the point of no return'. The mere fact that as yet it is not used to its full capacity or that it will be further developed as funds are available and more boys come into scouting does not in the least detract from its present actual, regular and exclusive use for purposes purely charitable. . . ."



Mr. James L. Wilson

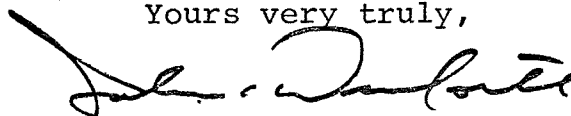
Such reasoning should be even more persuasive in the present case because the use of the property is not limited to a particular group (Boy Scouts) but is available to the public generally. See: Frisco Employees' Hospital Association, supra.

There is a line of cases that analyzes whether or not the use of the property involves a profit-making activity to an extent which would render the use of the property as not "purely charitable." Missouri Goodwill Industries v. Gruner, 210 S.W.2d 38 (Mo. 1948); Young Men's Christian Ass'n of St. Louis and St. Louis County v. Sestric, 242 S.W.2d 497 (Mo. Banc 1951); Defenders' Townhouse, Inc., supra at 369; Paraclete Manor of Kansas City, supra.

In the Defenders' Townhouse, Inc., supra, and Paraclete Manor of Kansas City, supra, the denial of exemption by the Missouri Supreme Court was based upon facts that indicated that the not-for-profit corporations were gaining valuable assets by charging rent sufficient to pay the mortgaged indebtedness pertaining to certain real property. As a result of rental contribution, the corporations would eventually own the real property with clear title. The facts pertaining to Dillard Mill, previously described, indicate that rent is nominal and the contemplated improvements to the property by the Department of Natural Resources are minimal. Therefore, the concern for potential "corporate profit" is not present in this case. Neither is the related concept of "personal benefit" present, which the Missouri Supreme Court found persuasive in State ex rel. Hammer v. MacGurn, 86 S.W. 138 (Mo. 1905). See also: Opinion No. 31, Burlison, dated June 8, 1967 (copy enclosed).

Therefore, it is the opinion of this office that the Dillard Mill property is used for "purposes purely charitable and not held for private or corporate profit" and is exempt from taxation under the laws of Missouri.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 172  
Lawson, 3-17-66

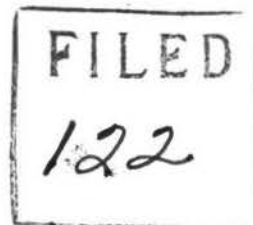
Op. No. 31  
Burlison, 6-8-67

REORGANIZATION ACT: The work of individuals, who  
DEPARTMENT OF HIGHER EDUCATION: perform duties for the Department of Higher Education, under  
work-release or work-internship programs, should be computed against  
the staff limitation contained in Section 6.2 of the Omnibus State  
Reorganization Act of 1974.

OPINION NO. 122

August 23, 1976

Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This opinion is in response to your request as follows:

"Section 6.2 of the Omnibus State Reorganization Act of 1974 states that the staff, professional, clerical and research personnel of the Department of Higher Education shall not, in any fiscal year, exceed twenty-five full-time personnel, regardless of the source of funding.

"The question is, does this limitation on staff size include only those paid from personal service appropriation, or does it include full-time personnel paid from operating appropriation, contractual services classification, and part-time work-study personnel also paid from operating appropriation?"

Section 6.2 of the Omnibus State Reorganization Act of 1974 (p. 1267, App. B, RSMo Supp. 1975) states in relevant part:

". . . The coordinating board shall appoint a commissioner of higher education who shall be the chief administrative officer for the coordinating board. The coordinating board may, in order to carry out the duties prescribed for it in subsections 1, 2, 3, 7, and 8 of this section, employ such professional, clerical and research personnel as may be necessary to assist it in performing those duties, but this staff shall not, in any fiscal year,

Honorable George W. Lehr

exceed twenty-five full-time equivalent employees regardless of the source of funding.  
. . ."

You have indicated that you are particularly interested in two programs involving the Department of Higher Education (hereinafter "the Department"). One program involves students from Lincoln University on a work-program internship basis. The other program involves inmates from the State Penitentiary on a work-release basis. Both programs are funded from the Department's operations appropriation.

The Department has provided us with the following relevant details concerning the two programs. The participants work on matters relating to processing applications under the "student-grant" program. The work hours and pay levels of the participants are established between the Department and those individuals and compensation is based on an hourly rate. All work is performed at the Department under staff supervision and all necessary materials are supplied by the Department. The need for the work is cyclical because student grant applications are received in concentrated periods during the year. The nature of the work is generally clerical and requires no specialized skill or professional education.<sup>1</sup> The work is part of the performance of the normal duties of the Department.

To compensate the Lincoln University students,<sup>2</sup> the Department pays Lincoln University an amount calculated to cover compensation for the work performed and an amount equal to any and all payments required to be made by the University under state workmen's compensation laws, F.I.C.A., or other applicable laws. The University issues the paycheck to each student. For the inmates, the Department draws a check payable to the individual and sends it to the Division of Corrections. No deductions are withheld from the check.<sup>3</sup>

The issue presented by your request is whether the work of the individuals in these two programs should be counted against the staff limitation previously quoted.

---

<sup>1</sup>The Department has informed us that individuals have progressed to levels of more sophisticated work.

<sup>2</sup>The Department has informed us that, as of June 21, 1976, one individual is presently involved in this program. Three other individuals were involved on a part-time basis from January through May, 1976.

<sup>3</sup>The Department has informed us that, as of June 21, 1976, one inmate is presently involved in this program.

Honorable George W. Lehr

Initially, there is a question concerning the interpretation of the phrase "twenty-five full-time equivalent employees." In Opinion No. 212, Bond, issued May 10, 1974, this office considered the interpretation of the term "FTE" as contained in an appropriation bill. After finding no statutory or other definition of the term, we stated as follows:

"This does not completely leave the meaning unresolved since you have further informed us that you believe the letters mean 'full-time equivalent,' and that this phrase appears in the instructions for preparation of personal service details in the budget forms developed by the Office of Administration. That definition is set out as follows:

Full-time Equivalent Computation:

The full-time equivalent number for existing positions as well as project employees will be computed in the following manner. A full-time equivalent employee is one working a full year, less vacation and holidays. For most agencies, a full-time position will be occupied by an employee working 233 days per year at 8 hours per day. An employee (existing positions or project employee) working less than this amount will be designated by showing the appropriate fractional number in the 'full-time equivalent' column.

"The meaning of 'FTE' in C.C.S.H.B. No. 1004 is still, in our opinion, legally unclear, but for purposes of further discussion, we will assume it means 'full-time equivalent' as defined above."

In the absence of further definition from the General Assembly, we believe it is equally valid to adopt the "budget form" definition for the purpose of construing the term "full-time equivalent employees" in Section 6.2.

Resolution of the issue turns on whether these individuals are considered employees of the Department or independent contractors. Each case turns on its own facts. Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 916 (Mo. 1934).

Honorable George W. Lehr

The Missouri Supreme Court has most recently expressed the appropriate test in Cline v. Carthage Crushed Limestone Company, 504 S.W.2d 102, 105-109 (Mo. 1973), as follows:

"[1,2] This Court has previously applied the tests laid down in the Restatement of Agency 2d, § 220, p. 485, in determining whether a questioned relationship is that of master and servant or employer and independent contractor. Dean v. Young, 396 S.W.2d 549, 553 (Mo.1965); Barnes v. Real Silk Hosiery Mills, 341 Mo. 563, 108 S.W.2d 58, 61[3-5] (1937). We accept those standards in deciding this appeal, and give a brief rescript of the evidence relating to each statement of the Restatement criteria:

'(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

'(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

'(a) the extent of control which, by the agreement, the master may exercise over the details of the work; \* \* \*.'

\* \* \*

'(b) [W]hether or not the one employed is engaged in a distinct occupation or business; \* \* \*.'

\* \* \*

'(c) [T]he kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; \* \* \*.'

\* \* \*

Honorable George W. Lehr

'(d) [T]he skill required in the particular occupation; \* \* \*.'

\* \* \*

'(e) [W]hether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; \* \* \*.'

\* \* \*

'(f) [T]he length of time for which the person is employed; \* \* \*.'

\* \* \*

'(g) [T]he method of payment, whether by the time or by the job; \* \* \*.'

\* \* \*

'(h) [W]hether or not the work is a part of the regular business of the employer; \* \* \*.'

\* \* \*

'(i) [W]hether or not the parties believe they are creating the relation of master and servant; \* \* \*.'

The right to control is the ultimate and decisive test. Klaber v. Fidelity Bldg. Co., 19 S.W.2d 758 (K.C.Mo.App. 1929); Sargent v. Clements, 88 S.W.2d 174 (Mo. 1935); Jokisch v. Life and Casualty Insurance Company of Tennessee, 424 S.W.2d 111 (St.L.Ct.App. 1967). See also: Handley v. State, Division of Employment Security, 387 S.W.2d 247 (K.C.Mo.App. 1965); Dean v. Young, 396 S.W.2d 549 (Mo. 1965); Madsen v. Lawrence, 366 S.W.2d 413 (Mo. 1963); and Talley v. Bowen Construction Company, 340 S.W.2d 701 (Mo. 1960).

As the previously cited facts reveal: all work is performed at the Department under staff supervision; the nature of the work is generally clerical and involves no training in a distinct occupation or skill. The work is considered part of the performance of the normal duties of the Department and is not the type of work normally done by a specialist without supervision; the Department supplies all materials and the place of work; the length of the employment period is determined by need based upon cyclical fluctuation in student-grant applications; and participants are paid by the hour.

Honorable George W. Lehr

We are compelled to conclude that the Department "employed" the participants to perform services in its affairs and controlled the physical conduct of the participants in the performance of said services. Madsen, supra. Also: Jokisch, supra; Handley, supra at 254.

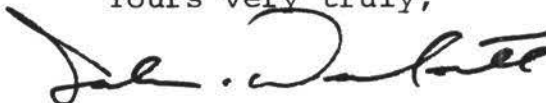
Therefore, we conclude that the work of these participants should be computed against the staff limitation imposed by Section 6.2 of the Omnibus State Reorganization Act of 1974. In reaching this conclusion, we in no way give our opinion as to the appropriateness of whether such employees should be paid out of personal services or operations.

#### CONCLUSION

It is the opinion of this office that the work of individuals, who perform duties for the Department of Higher Education, under work-release or work-internship programs, should be computed against the staff limitation contained in Section 6.2 of the Omnibus State Reorganization Act of 1974.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



August 16, 1976

OPINION LETTER NO. 123  
Answer by Letter - Iverson



Honorable James I. Spainhower  
State Treasurer of Missouri  
Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Spainhower:

This is in response to your request for an opinion on the following question:

"Do the funds recovered from checks written from the Conservation Commission Fund, which are not presented for payment within one year, revert to the above fund or the General Revenue Fund of the State?"

Article IV, Section 40(a) of the Missouri Constitution vests exclusively in the Conservation Commission the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of this state, together with the administration of all laws pertaining thereto. Article IV, Section 43 of the Missouri Constitution provides as follows:

"The fees, moneys, or funds arising from the operation and transactions of the commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wildlife resources of the state and from the sale of property used for said purposes, shall be expended and used by the commission for the control, management, restoration, conservation and regulation of the bird, fish,



Honorable James I. Spainhower

game, forestry and wildlife resources of the state, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto, and for no other purpose."  
(Emphasis added)

The language underlined above, given its plain and ordinary meaning, suggests that all revenues derived through the operations of the Conservation Commission may be expended only for the purposes enumerated in that section, and that only the Conservation Commission is authorized to make the expenditures. Although the power of the General Assembly to appropriate from general revenue is supreme, nonetheless it is subject to constitutional limitations. State ex rel. Davis v. Smith, 75 S.W.2d 826 (Mo. 1934).

In Marsh v. Bartlett, 121 S.W.2d 737 (Mo.Banc 1938), the Missouri Supreme Court examined what is now Article IV, Section 40(a) of the Missouri Constitution, which vests in the Conservation Commission extensive administrative authority. The court observed that in adopting their Constitution the people of this state expressly reserved the right to exercise the power to enact laws "without let or hinderance of the General Assembly." The court continued as follows:

" . . . This power, a political one, and the exercise of its functions is of the essence of sovereignty which resides in the people. In the Bill of Rights . . . it is declared 'That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.'

\* \* \*

"But the present attempt to exercise it does not deprive the legislative department of the government of its power or functions but relates to only a small portion of the power reserved to the people, the exercise of which suspends and supersedes the power of the legislature as to that portion alone. . . ." Id. at p. 743.

As you note in your opinion request, however, Section 30.200 requires that outstanding checks or drafts be presented for payment

Honorable James I. Spainhower

within one year from the date of issuance. That section continues as follows:

" . . . All moneys set aside to pay any outstanding check or draft which has not been presented for payment as required by this section shall be transferred to the general revenue. . . ."

The obvious objective of this provision is to return unused funds to general revenue in order that they may be appropriated by the legislature in future years. Yet Article IV, Section 43 appears to vest solely in the Conservation Commission the authority to expend all fees, moneys, or funds arising from the operation and transactions of the Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wildlife resources of this state.

Under Missouri law it is well established that a statute must be construed to avoid a conflict with the Constitution if such is possible. State ex rel. State Highway Commission v. Paul, 368 S.W.2d 419, 422 (Mo.Banc 1963). In State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973), the Missouri Supreme Court considered a question similar to the one you have posed for it concerned a constitutionally established fund. In that case the State Highway Commission contended that when the treasurer invested state road funds pursuant to Section 30.240, the State Highway Commission was entitled to the interest thereon. The state treasurer argued that under Section 30.240 he was required to credit all "yield, interest, income, increment, or gain" received from investments to the general revenue.

In attempting to harmonize the constitutional and statutory provisions, the Missouri Supreme Court described the objective of Article IV, Section 30(b) of the Missouri Constitution as follows:

" . . . It is clear, however, that the people of Missouri, by Article IV, Section 30(b), . . . intended that no money be diverted from the state road fund and no other use be permitted of the fund except for the enumerated state highway purposes. Pohl v. State Highway Commission, 431 S.W.2d 99, 104-105, 106 (Mo.banc 1968). With the state road fund so restricted against transfer or use for any other purpose, interest or income from such fund must be credited to that fund under Article IV, Section 15, and held

Honorable James I. Spainhower

against withdrawal or use for any purpose other than state highway purposes, including diversion to the general revenue fund." State Highway Commission v. Spainhower, supra, at p. 125.

It is equally clear that the people of Missouri, by Article IV, Section 43 intended that no money be diverted from the Conservation fund and no other use be permitted of the fund except for the enumerated conservation purposes.

In State Highway Commission v. Spainhower, however, the court found no conflict between the constitutional and statutory provisions because Section 30.240 required the state treasurer to hold all state moneys "for the benefit of the respective funds to which they belong." Id. at 125. Section 30.200, RSMo, contains no comparable language, and we are forced to conclude that a conflict exists between Article IV, Section 43 of the Constitution and this section.

The conflict between Article IV, Section 43 of the Missouri Constitution and Section 30.200, RSMo, is resolved by reference to Article IV, Section 44 of the Constitution, which provides as follows:

"Sections 40-43, inclusive, of this article shall be self-enforcing, and laws not inconsistent therewith may be enacted in aid thereof. All existing laws inconsistent with this article shall no longer remain in force or effect."

The first sentence quoted above authorizes the legislature to enact only those "laws not inconsistent" with Article IV, Section 43. By enacting Sections 40 through 44, the people clearly intended the Conservation Commission Fund to be used for only the enumerated purposes as determined by the Conservation Commission. State Highway Commission v. Spainhower, supra, at 125. If moneys that are set aside are returned to general revenue pursuant to Section 30.200, RSMo, those sums would be available to the General Assembly to appropriate for purposes other than those established by the Conservation Commission. By virtue of Sections 43 and 44 of Article IV of the Missouri Constitution, the General Assembly is without authority to require by statute that these funds be transferred to general revenue.

Honorable James I. Spainhower

We enclose Opinion Letter 158, rendered July 1, 1975, which makes the same holding concerning moneys set aside to pay outstanding checks or drafts on the State Highway Fund or the State Road Fund.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. Ltr. No. 158,  
7/1/75, Spainhower



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
**JEFFERSON CITY**

June 11, 1976

OPINION LETTER NO. 124

Honorable Donald L. Manford  
Missouri Senate, 8th District  
334 State Capitol  
Jefferson City, Missouri 65101

Dear Senator Manford:

This letter is in response to your question asking:

"Are regional planning commissions such as Mid-America Regional Council and others-- having been authorized by Chapter 251, RSMo 1969, in violation of Article 6, Section 14, because no popular vote was taken in their adoption--and therefore are these regional councils and commissions and Chapter 251, RSMo, unconstitutional?"

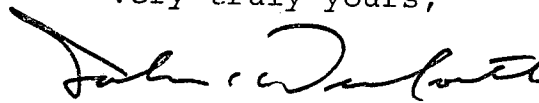
We considered a similar question in our Opinion No. 146, dated May 19, 1972, to Reisch, copy enclosed. In that opinion we concluded that counties may cooperate with each other under the provisions of Section 16, Article VI of the Missouri Constitution.

We believe that the reasoning in that opinion is applicable here. The "State and Regional Planning and Community Development Act" Sections 251.150, et seq., RSMo, authorizes the creation of a regional planning commission by the governor upon petition in the form of a resolution by the governing body of a local unit of government if the governor finds that there is a need for such commission and if the governing bodies of local units in the proposed region which include more than fifty percent of the population consent to the formation of the commission.

Honorable Donald L. Manford

We are of the view that Section 14, Article VI of the Constitution does not limit the power of the legislature to authorize creation of regional planning commissions in the manner provided. We conclude that such statutory provisions would be held by the courts to be constitutional.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 146  
5/19/72, Reisch

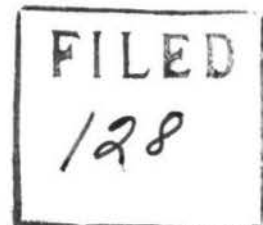
CORPORATIONS:  
AGRICULTURE:  
FARMING:  
BANKS:

A bank or other financial corporation acting as a trustee, as an executor, or in some other fiduciary capacity exercising control over agricultural land, must file reports with the Director of the Missouri State Department of Agriculture pursuant to Section 350.030, RSMo Supp. 1975.

OPINION NO. 128

July 8, 1976

Mr. James B. Boillot, Director  
Department of Agriculture  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Boillot:

This is in response to your request for an official opinion from this office, which poses the following question:

"Does Section 350.020, RSMo Supp. 1975, require a banking or other financial corporation to file reports with the Director of the Department of Agriculture when the bank or other financial corporation acts as a trustee, as an executor, or in some other fiduciary capacity exercising control over agricultural land?"

The section you refer to in your question is part of Chapter 350, passed in 1975 by the Missouri General Assembly, dealing with corporations engaged in farming. In Section 350.020 of that chapter the legislature has required the following:

"1. Every corporation engaged in farming or proposing to commence farming in this state after September 28, 1975, shall file with the director of the state department of agriculture a report containing the following information;

(1) The name of the corporation and its place of incorporation;

Mr. James B. Boillot

(2) The address of the registered office of the corporation in this state, the name and address of its registered agent in this state and, in the case of a foreign corporation, the address of its principal office in its place of incorporation;

(3) The acreage and location listed by section, township and county of each lot or parcel of land in this state owned or leased by the corporation and used for farming, and

(4) The names and addresses of the officers and the members of the board of directors of the corporation."

Farming is defined by the new chapter to mean:

". . . using or cultivating land for the production of (a) agricultural crops; (b) livestock or livestock products; (c) poultry or poultry products; (d) milk or dairy products; or (3) fruit or other horticultural products, provided; however, farming shall not include a processor of farm products or a distributor of farming supplies contracting to provide spraying, harvesting or other farming services." Section 350.010(6).

Agricultural land is defined to mean "land used for farming."  
Section 350.010(1).

There is no specific exemption for banks or other financial corporations acting as trustee, as an executor, or in some other fiduciary capacity exercising control over agricultural land. An attempt to amend Chapter 350 to include such an exemption was introduced in the second regular session of the 78th General Assembly as Senate Bill 474, which would have redefined the term corporation in Section 350.010(3) to mean:

"A corporation or a cooperative [other than a bank or trust company acting as executor or trustee under the terms of will or trust established by one or more natural persons]."  
(The proposed revision is shown in brackets.)

It is a fundamental tenet of the law of trusts that title must pass to a trustee in order to establish a valid trust.



Mr. James B. Boillot

Atlantic National Bank of Jacksonville, Fla. v. St. Louis Union Trust Company, 211 S.W.2d 2 (Mo. 1948); 1 G. Bogert, The Law of Trusts and Trustees, Section 11 (2d Ed. 1965); Restatement (2nd) of Trusts, Section 2 (1959). This title in the trustee is normally legal title, giving the trustee a legal interest in the trust res along with his duties in managing trust assets. An executor, depending upon the particular circumstances involved in the estate he manages, may or may not have an interest in real property. See 1 G. Bogert, supra, Section 12.

" . . . Undeniably probate courts have the jurisdiction to order the sale or leasing of real estate for the payment of debts. . . . This can only be done, however, when the court is satisfied of its necessity, and, until the order of the court either to sell or lease, the administrator or executor has no rights over the real estate (Grant v. Hathaway, 215 Mo. 141, 114 S.W. 609, 15 Ann. Cas. 567; Anderson v. Taylor [Mo.Sup.] 227 S.W. 84), as title to the real estate upon the death of the owner passes to and vests directly in the heirs or devisees (Seilert v. McAnally, 223 Mo. 505, 122 S.W. 1064, 135 Am.St.Rep. 522)." [Now contained in Mo. Const. Art. 5 § 16 (1945).]  
Rhodes v. Wilson, 239 S.W. 112, 113 (Mo. 1922).

It is also clear that executors have the right to transfer title to real property for the purpose of paying debts of the estate. Blum v. Frost et al., 116 S.W.2d 541 (St.L.Ct.App. 1938).

In interpreting the language of Chapter 350, the intention of the legislature must be determined. State ex rel. Zoological Park Subdistrict of City and County of St. Louis et al. v. Jordan, 521 S.W.2d 369 (Mo. 1975). Since the legislature did not exclude from the definition of corporation a bank or a trust company or other financial institution exercising control over agricultural land, and since corporation is defined in the general sense in Chapter 350, it is apparent that banks or other financial corporations acting as a trustee, as an executor, or in some other fiduciary capacity exercising control over and holding title to agricultural land must file reports with the Director of the Missouri State Department of Agriculture as required in Section 350.020.

Mr. James B. Boillot

CONCLUSION

Therefore, it is the opinion of this office that a bank or other financial corporation acting as a trustee, as an executor, or in some other fiduciary capacity exercising control over agricultural land, must file reports with the Director of the Missouri State Department of Agriculture pursuant to Section 350.020, RSMo Supp. 1975.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert H. House.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

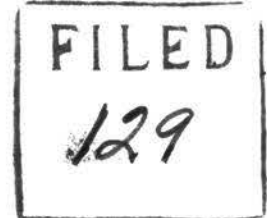
DEPARTMENT OF MENTAL HEALTH:

The Director of the Department of Mental Health, as appointed by the Mental Health Commission and confirmed by the Senate, is not required to be a physician competent in the field of mental health, administration, and program planning.

OPINION NO. 129

July 6, 1976

Philip R. Dodge, M.D., Chairman  
Missouri Mental Health Commission  
St. Louis Children's Hospital  
500 South Kingshighway  
St. Louis, Missouri 63110



Dear Dr. Dodge:

This opinion is in response to the request this office received from Harold P. Robb, M.D., in his capacity as Director of the Department of Mental Health asking:

"What are the statutory qualifications, if any, for the Director of the Department of Mental Health?"

Section 9, subsection 1 of the Omnibus State Reorganization Act of 1974 (C.C.S.H.C.S.S.C.S.S.B. No. 1, 77th General Assembly, First Extraordinary Session) provides in pertinent part:

"There is hereby created a department of mental health to be headed by a mental health commission who shall appoint a director, by and with the advice and consent of the senate. The director shall be the administrative head of the department and shall serve at the pleasure of the commission and be compensated as provided by law for the director, division of mental health. . . ."

In Opinion No. 161, 1974 (copy enclosed), this office concluded that a portion of the above statute was in conflict with Article IV, Section 37(a) of the Missouri Constitution, as amended, insofar as it provided that the Mental Health Commission was the head of the Department rather than the Director. We further concluded that the invalidity of this portion did not affect the remainder of Senate Bill No. 1 since such portion was severable.

Philip R. Dodge, M.D.

In our view, the answer to your question is determined by whether the General Assembly in enacting the above section intended to engraft the statutory qualifications for the Director of the Division of Mental Health contained in Section 202.035, RSMo 1969.

Section 202.035 provides in pertinent part:

"1. The chief administrative officer of the division of mental health shall be the director of the division who, effective January 1, 1958, shall be appointed by the state mental health commission for a term of four years and shall be eligible for reappointment. The director shall devote his full time to the office.

"2. The director shall be a physician competent in the field of mental health, administration and program planning, and the salary of the director shall be set by the commission but shall not exceed thirty-five thousand dollars per year."

It is a well-settled maxim of statutory construction to seek the intention of the lawmakers. Such intent should be ascertained, if possible, from the words used and should ascribe to the language used in its plain and rational meaning. State ex rel. Wright v. Carter, 319 S.W.2d 596 (Mo. 1958). It is also well settled that a court in construing a statute is not to supply, insert, or read words into the statute unless there is an omission plainly indicated and unless the statute as written is incongruous, unintelligible, or leads to absurd results. State ex rel. May Department Stores Co. v. Weinstein, 395 S.W.2d 525 (St.L.Ct.App. 1965). There is another maxim of statutory construction known as "expressio unius est exclusio alterius," namely that the mention of one thing in a statute implies the exclusion of another thing. DePortere v. Commercial Credit Corp., 500 S.W.2d 724 (Spr.Ct.App. 1961).

A review of Article IV, Section 37(a) of the Missouri Constitution, as amended, and the Omnibus State Reorganization Act demonstrates that the Mental Health Commission, the Department of Mental Health, and the Director of the Department are new creations. Section 9, subsection 2 of the Reorganization Act created a new Mental Health Commission and specifically terminated the terms of the prior Mental Health Commission existing by virtue of Section 202.031, RSMo 1969. Subsection 3 of Section 9 abolished the Division of Mental Health, Department of Public Health and Welfare, and transferred

Philip R. Dodge, M.D.

by Type I transfer all the powers, duties, and functions of the Division and the Director of the Division and other officials of the Division to the Department of Mental Health. A Type I transfer was a transfer of all of the authority, powers, duties, functions, records, personnel, property, etc., of an existing department or division to the director of the new department for assimilation and assignment within the department as the director shall determine.

The conclusion that the Reorganization Act created the new position of the Director of the Department of Mental Health is reinforced by the wording of subsection 1 of Section 9. The new Mental Health Commission appointed Dr. Robb as the Director on June 28, 1974. This appointment was confirmed by the Senate on December 17, 1974 (Senate Journal, 77th General Assembly, 1974-1975, pp. 103-105). Furthermore, the Director of the Division of Mental Health had a four-year term of office and was not confirmed by the Senate; but now the Director of the Department serves at the pleasure of the Mental Health Commission and can be removed by either the Commission or the Governor (Opinion No. 215, 1974, copy enclosed). Although Dr. Robb was the Director of the Division of Mental Health at the time of the effective date of the Reorganization Act, he did not by virtue of that position become Director of the Department of Mental Health. He became Director when he was appointed by the Mental Health Commission and confirmed by the Missouri Senate.

This conclusion is consistent with the decision of the Missouri Supreme Court in State ex inf. Danforth v. Butler, 524 S.W.2d 1 (Mo. Banc 1975). There the court held that the Chairman of the Industrial Commission existing under Missouri law prior to the Reorganization Act continued in office. The decision was partially based on the fact that the legislature in Section 8 of the Reorganization Act provided that the members of the Industrial Commission on the effective date of the Reorganization Act would become members of the new Labor and Industrial Relations Commission and the terms of the members shall be the same as provided by law for the Industrial Commission. Additionally, Butler was concerned with virtually the same constitutional department both before and after reorganization, where here there is a new constitutional department not existing as a department prior to reorganization.

As noted above, the legislative intent is to be ascertained from the words and phrases used. Words are not to be inserted or read into a statute unless the omission is plainly indicated and unless the statute as written is incongruous, unintelligible, or leads to absurd results. Here, the legislature created a new position which was filled by a new appointment. The Reorganization Act is silent as to any qualifications for the Director of the Department of Mental Health.



Philip R. Dodge, M.D.

We have also considered whether the provisions of Section 1, subsection 14(1) of the Reorganization Act apply. Subsection 14 (1) provides:

"Unless otherwise provided, where this act establishes a method of appointment other than presently provided by law, those persons serving terms fixed by law shall serve out the remainder of the term for which they were appointed and on the expiration of terms, after July 1, 1974, the appointment shall be made as provided herein. The qualifications, terms, compensation and related matters will remain as in present law except as specifically altered by this act."

In our view, this subsection is not applicable since we are dealing with a new constitutional agency and a new position which did not exist prior to reorganization. Also, as noted previously, Dr. Robb as Director of the Division of Mental Health did not become Director of the Department by virtue of that fact. He became Director of the Department when formally appointed on June 28, 1974, by the new Mental Health Commission as created by Section 9, subsection 3 of the Reorganization Act.

In Opinion No. 236, 1974 (copy enclosed), this office concluded that the Director of the Division of Credit Unions, Department of Consumer Affairs, Regulation and Licensing, was a new position and did not have to meet the qualifications of the Supervisor of Credit Unions and all the duties relating to credit unions vested in the Commissioner of Finance were transferred by Type II transfer to the Director of the Division.

The only difference we can perceive is that here the legislature provided that the Director of the Department of Mental Health was to be compensated as provided by law for the Director of the Division of Mental Health. Had the legislature intended to impose the qualifications required for the Director of the Division on the Director of the Department (a new position), we believe it would have expressly done so. But it did not. We believe the legislature cross referenced to the compensation provision of Section 202.035 to avoid the effect of Section 1, subsection 6, subdivision 7 of the Reorganization Act which provides that the directors of the departments are to be compensated at the rate of \$30,000 per year. Otherwise, the director of the new department would be compensated less than the amount of salary that existed for the director of the predecessor agency. The fact that the General Assembly cross referenced to the compensation provisions but did not include the

Philip R. Dodge, M.D.

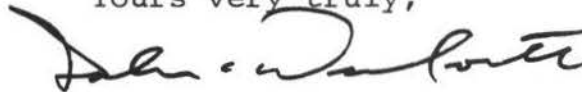
qualifications is conclusive, in our view, of a legislative intent not to require the Director of the Department to be a physician; particularly when the legislature in Section 2, subsection 1 of the Reorganization Act specifically provided that the Director of the Department of Agriculture shall possess the qualifications provided by law for the Commissioner of Agriculture.

CONCLUSION

Therefore, it is the opinion of this office that the Director of the Department of Mental Health, as appointed by the Mental Health Commission and confirmed by the Senate, is not required to be a physician competent in the field of mental health, administration, and program planning.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Daniel P. Card II.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 161  
4-4-74, Robb

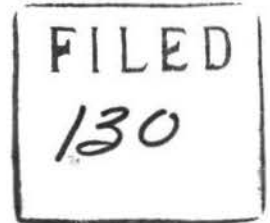
Op. No. 215  
6-12-74, Bond

Op. No. 236  
6-13-74, Bond

July 6, 1976

OPINION LETTER NO. 130  
Answer by Letter - Klaffenbach

Honorable John W. Buechner  
State Representative, 94th District  
14 Ponca Trail  
Kirkwood, Missouri 63122



Dear Representative Buechner:

This letter is in response to your question asking:

"Can the Mayor of a fourth class city in the State of Missouri cast a vote to break a tie of the Board of Aldermen thereby enabling the legal passage of an ordinance?"

The confusion arises out of the provisions of Sections 79.120 and 79.130, RSMo, with respect to fourth class cities. Section 79.120 states that the mayor shall have a seat in and preside over the board of aldermen, but shall not vote on any question except in case of a tie. On the other hand, Section 79.130 provides that no ordinance shall be passed except by bill and no bill shall become an ordinance unless on its final passage a majority of the members elected to the board of aldermen shall vote for it. We believe that the question has been resolved by the Kansas City Court of Appeals' decision in the case of Mound City ex rel. Reinert Bros. Const. Co. v. Shields, 278 S.W. 798 (1926). In that case the court considered both of the sections involved and determined that Section 79.120 controlled and the mayor did have the right to cast the deciding vote on an ordinance in case of a tie.

Very truly yours,

JOHN C. DANFORTH  
Attorney General





OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

July 14, 1976

OPINION LETTER NO. 131

Honorable Edward C. Graham  
Prosecuting Attorney  
Mississippi County  
107 East Commercial Street  
Charleston, Missouri 63834

Dear Mr. Graham:

This is in response to your request for an opinion from this office as follows:

"East Prairie, Missouri, a city of the fourth class with a population in excess of 3,000, adopted the City Manager form of government under the provisions of Section 78.430 et seq.

"After six years, the City abandoned the plan under the provisions of Section 78.450.

"Presently, the City is served by five council members, elected at large, two of such members presently serving terms expiring in April 1977, two members serving terms that will expire in April 1978, and one serving a term that will expire in April 1979.

"Question 1: Do the present City council members continue in office until their respective terms expire? If so, how and when will the City comply with the provisions of the statutes pertaining to the election of a Mayor and Aldermen in fourth class cities?

Honorable Edward C. Graham

"Question 2: If the provisions of Section 78.450 require a new election for Aldermen, then:

- (a) When must that election be held:
  - (1) Immediately by special election, or
  - (2) At the general election in November, or
  - (3) At the primary election in April of 1977.
- (b) If an election for Aldermen and Mayor is to be held prior to the primary election in April of 1977, will the special election be for a term only from such special election to April 1977?
- (c) If no election for Aldermen is required until the April 1977 election, at that time will the election be conducted under the provisions of Section 79.060, as if the City had just qualified for a fourth class classification or had just organized as a fourth class city?"

From the information you have given us, it appears that the City of East Prairie, Missouri, a city of the fourth class with a population in excess of three thousand, adopted the city manager form of government under the provisions of Sections 78.430, et seq., RSMo. After six years, the city abandoned the plan under the provisions of Section 78.450, RSMo.

Section 78.450 provides that any city operating under the provisions of Sections 78.430 to 78.640 may abandon the form of organization provided for therein by submitting the proposition to a vote of the people as to whether the city manager form of government should be continued. It further provides:

". . . If a majority of the votes cast at the election are against the continuation of the city manager form of government, then the provisions of sections 78.430 to 78.640 and all amendments thereto cease to be effective in the city and the city shall resume the form of government it abandoned

Honorable Edward C. Graham

when it adopted the plan herein provided for, and shall organize thereunder; except that any third class city desiring to vote on the proposition to determine whether or not to remain organized under the provisions of sections 78.430 to 78.640, may at the same time submit the question as to what form of government it shall adopt, if there is more than one other form provided for third class cities; but the change of form or organization does not become effective until the next regular municipal election thereafter."  
(Emphasis supplied)

This statute provides that if the majority of votes cast at the election are against the continuation of the city manager form of government, the statutory provisions regarding the city manager form of government shall cease to be effective in the city and the city shall resume the form of government it abandoned when it adopted the plan and "shall organize thereunder" but the change of form or organization does not become effective until the next regular municipal election thereafter.

It is our view that the city manager form of government continues in effect until the next regular municipal election after the election was held to abandon the city manager form of government and that all the officers elected under the city manager form of government continue into office until the next regular municipal election which will be in April, 1977. There is no provision for a special election to be held prior to that time.

Section 79.030, RSMo, provides that in any city of the fourth class a general election for the elective offices of a city of the fourth class shall be held on the first Tuesday in April next after the organization of the city under the provisions of Chapter 79, RSMo.

Section 79.060, RSMo, provides as follows:

"The board of aldermen shall, by ordinance, divide the city into not less than two wards, and two aldermen shall be elected from each ward by the qualified voters thereof, at the first election for aldermen in cities adopting the provisions of this chapter. At such election for aldermen, the person receiving the highest number of votes in each ward shall hold his office for two years, and the person receiving the next highest number of votes

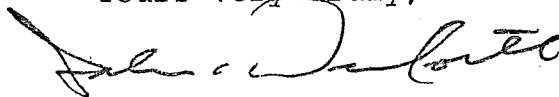
Honorable Edward C. Graham

shall hold his office for one year; but thereafter each ward shall elect annually one alderman, who shall hold his office for two years."

It is the opinion of this office that the board of aldermen shall be elected as provided in Section 79.060.

It is our view that when a city manager form of government is abandoned by a fourth class city as provided for in Section 78.450, RSMo, a change of form or organization does not become effective until the next regular municipal election thereafter but at the next regular municipal election the aldermen shall be elected as provided for in Section 79.060, RSMo.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

AMBULANCES:  
AMBULANCE DISTRICTS:  
ATTORNEYS:

An ambulance district created under the provisions of Sections 190.005, et seq., RSMo Supp. 1975, is authorized to employ private legal counsel.

OPINION NO. 132

July 14, 1976

Honorable Emory Melton  
State Senator, 29th District  
201 West 9th Street  
Cassville, Missouri 65625



Dear Senator Melton:

This opinion is in response to your question asking whether an ambulance district has the authority to employ an attorney.

Ambulance districts created under the provisions of Sections 190.005, et seq., RSMo Supp. 1975, are bodies corporate and political subdivisions of the state under Section 190.010, RSMo Supp. 1975. Further, under Section 190.060, RSMo Supp. 1975, ambulance districts have the power to employ or enter into contracts for employment of any person, firm or corporation and for professional services necessary or desirable for the accomplishment of the objects of the district or the proper administration, management, protection or control of its property.

We conclude that such ambulance districts are authorized to employ an attorney or attorneys under Section 190.060.

You also ask whether the ambulance district is entitled to the services of a "public attorney" and we assume you refer to a prosecuting attorney. Under Sections 56.060 and 56.070, RSMo Supp. 1975, the prosecuting attorney (except to some extent in counties of the first class not having a charter form of government for which a county counselor is appointed) is required to represent generally the county in all matters of law and has the duty to commence and prosecute all suits involving the state or the county. As we have noted however, an ambulance district is not a part of the county. It is a separate political subdivision of the state. The prosecuting attorney has no duty or authority to represent ambulance districts.

We enclose Opinions No. 84, rendered September 4, 1943, to George A. Spencer, holding that prosecuting attorneys are not

Honorable Emory Melton

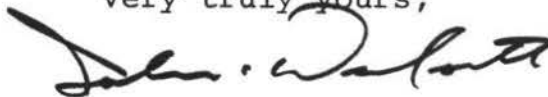
required to represent school districts; No. 97, rendered August 23, 1949, to Robert P. C. Wilson III, holding that the prosecuting attorney is not required to represent special road districts; and No. 63, rendered April 1, 1954, to J. Hal Moore, holding that a special road district may employ an attorney.

CONCLUSION

It is the opinion of this office that an ambulance district created under the provisions of Sections 190.005, et seq., RSMo Supp. 1975, is authorized to employ private legal counsel.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 84  
9/4/43, Spencer  
  
Op. No. 97  
8/23/49, Wilson  
  
Op. No. 63  
4/1/54, Moore

ELECTIONS:  
BALLOTS:

A ballot for a political party at the August Primary may contain more than one column so long as all the candidates for any office are listed in one column.

OPINION NO. 133

July 8, 1976

Mr. James E. Moore III  
Prosecuting Attorney  
Scott County  
314 West North Street  
Sikeston, Missouri 63801



Dear Mr. Moore:

This opinion is in response to your letter asking whether or not a two column ballot may be used in the primary election on August 3, 1976.

You also note that it has been the practice in the past to use a one column ballot. However, due to the great number of candidates seeking office this year the physical size of a one column ballot would be unwieldly.

It is also our understanding from other sources that the printing process used by many printers limits the size of the ballot.

The form of the ballot in primary elections is governed by the provisions of Section 120.450, RSMo Supp. 1975. Such section additionally provides that, as nearly as practicable, the ballot shall be in the form described in Chapter 111, RSMo.

We find nothing in Section 120.450 or in Chapter 111, particularly Section 111.341, RSMo, which would prohibit the printing of the primary ballot in two columns so long as the candidates for a particular office are all listed in one column.

#### CONCLUSION

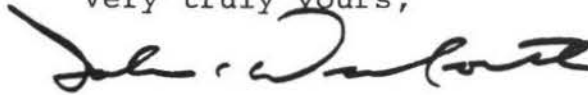
It is the opinion of this office that a ballot for a political party at the August Primary may contain more than one

Mr. James E. Moore III

column so long as all the candidates for any office are listed in one column.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
**JEFFERSON CITY**

August 6, 1976

OPINION LETTER NO. 134  
Answer by Letter - Bartlett

Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Elementary and  
Secondary Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

In accordance with your request, we have reviewed the Missouri State Board of Education's "Amended Annual Program Plan for Fiscal Year 1976 Under Part B, Education of the Handicapped Act, as Amended by P.L. 93-380."

In addition to the "Education of the Handicapped Act," as amended by the "Education of the Handicapped Amendments of 1974" (P.L. 93-380, 20 U.S.C. 1402, et seq.) and the regulations propounded pursuant thereto (45 C.F.R. 121, 121a-j, October 1, 1975 edition, as amended in 41 Federal Register 8608, February 27, 1976), our review has taken into consideration Article III, Section 38(a), Missouri Constitution and Section 161.092, RSMo 1975 Supp.

Based on the foregoing, we hereby certify that the Missouri State Board of Education has authority under state law to submit the plan and to administer or to supervise the administration of the plan. Also, the State Board of Education has authority under state law to carry out directly or through local educational agencies the activities described in the state plan. The provisions of the plan are consistent with state law.

In addition to this opinion letter which constitutes our official certification, we have executed the form of certification attached to the Amended Annual Program Plan.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

August 4, 1976

JOHN C. DANFORTH  
ATTORNEY GENERAL

OPINION LETTER NO. 135

Honorable Hardin C. Cox  
State Senator, District 12  
602 West Calhoun  
Rock Port, Missouri 64482

Dear Senator Cox:

This is in response to your request for an opinion from this office as follows:

"Must a County Assessor in a county of the third class maintain his office on a yearly basis?

"The County Assessor of Worth County, a county of the third class, is paid on a yearly basis. He closes his office on June first, or there about, depending on when his books are ready to turn over to the County Clerk."

We assume you mean the office remains closed for an indefinite period of time.

We are unable to find any statute in this state or any appellate court decision specifically applicable to the assessor on this point.

Section 53.010, RSMo, provides that in each county of this state, except those under township organization, shall elect a county assessor who shall hold his office for a term of four years and until his successor is elected and qualified.

Section 49.510, RSMo, provides as follows:

Honorable Hardin C. Cox

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

Under this statute, it is the duty of the county court to provide the county assessor with necessary office space to carry on and perform the duties of his office.

Section 49.265, RSMo, provides as follows:

"The county court in all counties of class two, by order entered of record, may authorize all county offices, except the sheriff's office, to be open not more than five days each week, and in all counties of classes three and four by order entered of record, may authorize all county offices, except the sheriff's office, to be open not more than five and one-half days each week. The county court, after entering such an order, may require any office to be open six days a week when public convenience requires. The authorization by the county court in counties of the third and fourth class to close such offices must be published three times in the county newspapers and such authorization to be signed by the county court."

In an opinion issued by this office on September 23, 1959, to Phil Hauck (copy enclosed), we held this statute did not grant the county court of a third class county authority to authorize any county office to be open only five days a week.

Section 109.180, RSMo, provides as follows:

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and

Honorable Hardin C. Cox

those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement."

Section 109.190, RSMo, provides as follows:

"In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public records, instruments or documents, any person has the right of access to the records, documents or instruments for the purpose of making photographs of them while in the possession, custody and control of the lawful custodian thereof or his authorized deputy. The work shall be done under the supervision of the lawful custodian of the records who may adopt and enforce reasonable rules governing the work. The work shall, where possible, be done in the room where the records, documents or instruments are by law kept, but if that is impossible or impracticable, the work shall be done in another room or place as nearly adjacent to the place of custody as possible to be determined by the custodian of the records. While the work authorized herein is in progress, the lawful custodian of the records may charge the person desiring to make the photographs a reasonable rate for his services or for the services of a deputy to supervise the work and for the use of the room or place where the work is done."

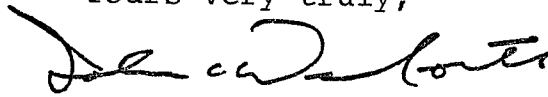
In State ex rel. Eggers v. Brown, 134 S.W.2d 28 (Mo.Banc 1939), the Supreme Court held the right given by statute to inspect and copy public records in the offices of the motor vehicle commission is limited by such reasonable regulations as the commissioner of motor vehicles may impose to prevent undue interference with the work of the employees of the office or with members of the public being served at the office.

Honorable Hardin C. Cox

It is our view that under Sections 109.180 and 109.190 the records in the assessor's office are public records and must be open for personal inspection at all reasonable times by any citizen of Missouri and that it is the duty of the assessor of a third class county to comply with the above-statutory provisions.

It is our view that in the absence of a statute authorizing a county assessor in a third class county to close his office for an indefinite period of time, it is his duty to keep his office open to the public during the normal working hours.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 38  
9-23-59, Hauck

July 28, 1976

OPINION LETTER NO. 136  
Answer by letter-Mansur



Honorable Jack C. Bauer  
Prosecuting Attorney  
Harrison County  
122 North 16th Street  
Bethany, Missouri 64424

Dear Mr. Bauer:

This is in response to your request for an opinion from this office as follows:

"a) Does an individual employed as a policeman in a City of the Fourth Class automatically forfeit that employment upon his election to the position of City Marshal of that City, or does his employment as a policeman survive the expiration of his term as City Marshal and render re-employment necessary?

"1. Gary D. Bullock was hired as a policeman for the City of Bethany, a Fourth Class City, in 1973. Policemen are hired by the mayor, and confirmed by the Board of Aldermen.

"2. In April of 1974, Gary Bullock was elected City Marshal of the City of Bethany. He did not formally resign from his employment as a policeman, and continued to perform the normal duties of a policeman, being paid accordingly.

"3. Gary Bullock served as City Marshal until his term expired in April of 1976.

Honorable Jack C. Bauer

"4. In April of 1976, Gary Bullock's father, Neal Bullock, was elected Mayor of the City of Bethany. Gary Bullock questions whether or not he is still employed as a policeman, and the Mayor wishes to avoid the nepotism issue."

You first inquire whether an individual employed as a policeman in a city of the fourth class automatically forfeits that employment upon his election to the position of city marshal of that city.

We find no statute in this state which authorizes the same person to fill these offices at the same time. The question is whether, under the common law and under the statutes concerning the duties of these officers, the duties are such that they are incompatible and cannot be filled by the same person at the same time.

We are enclosing herewith Opinion No. 172 issued May 24, 1963, to John L. Fitzgerald to the effect that the office of marshal in a fourth class city and that of a patrolman in a fourth class city are incompatible due to the fact that the office of patrolman is subordinate and accountable to the office of marshal.

We believe this opinion is sound and correctly states the law in this state on this question.

Concerning the result that happens when a person accepts another office which is incompatible with the office he occupies, it is stated in 100 A.L.R., annotated, as follows:

"In State ex rel. Walker v. Bus (1896) 135 Mo. 325, 36 S. W. 636, 33 L.R.A. 616, the court, after declaring the rule to be well settled at common law that where one, while occupying a public office, accepts another which is incompatible with it, the first will ipso facto terminate without judicial proceeding or any other act of the incumbent, the acceptance of the second office operating as a resignation of the first, said: 'Where the holding of two offices by the same person at the same time is forbidden by the Constitution or a statute, the effect is the same as in case of holding incompatible offices at common law. In such case the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential. In

Honorable Jack C. Bauer

each case, the holding of two offices is illegal; it is made so in one case by the policy of the law, and in the other by absolute law. In either case the law presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied.'"

It is our view that under the facts submitted when the policeman was elected and qualified as the city marshal his acceptance of the office of city marshal operated as a resignation of his office as city policeman.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

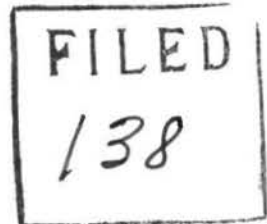
Enclosure: Op. No. 172  
5-24-63, Fitzgerald



July 14, 1976

OPINION LETTER NO. 138  
Answer by Letter - Klaffenbach

Honorable James C. Kirkpatrick  
Secretary of State  
State of Missouri  
Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

In answer to your request dated July 6, 1976, we have prepared a ballot title for a constitutional amendment proposed by the initiative.

The ballot title is:

Increases funding for bird, fish, game,  
forestry and wildlife programs by levying  
additional sales and use taxes of one-  
eighth of one percent.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

July 21, 1976

OPINION LETTER NO. 139

Honorable David L. Zerrer  
Prosecuting Attorney  
Monroe County Courthouse  
Paris, Missouri 65275

Dear Mr. Zerrer:

This letter is in response to your question asking:

"Section 451.090 (2), RSMo 1969 reads in part:

'Section 2....Which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths.'

"Question 1: Does '....at the time, in writing,...' mean that the parental consent form be actually filled out and executed at the time of application in the Recorder's Office?

"Question 2: Is a notary public an 'officer authorized to administer oaths' contemplated by this section of the statute.

"Question 3: If a Notary Public can acknowledge a parental consent, is it necessary for the consenting parent to appear before the Recorder"

Subsection 2 of Section 451.090, RSMo Supp. 1975, provides:

"And no recorder shall issue a license authorizing the marriage of any male under

Honorable David L. Zerrer

the age of eighteen years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths."

We note that under Section 59.150, RSMo, the recorder of deeds is authorized to administer oaths to any person in matters relating to the duties of his office.

Under Section 486.020, RSMo, notaries public are authorized to take and certify depositions and affidavits and administer oaths and affirmations.

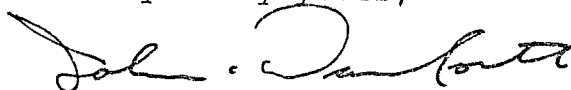
We also note that other officers are authorized to administer oaths under Sections 492.010 and 492.020, RSMo.

It therefore appears to be doubtful that the legislature intended to require that consent be given only at the office of the recorder of deeds at the time the marriage license is applied for because if such was the legislative intent there would have been little, if any, reason why the legislature also provided that parental consent could be given and the oath be sworn to before an officer authorized to administer oaths. That is, it is clear the recorder himself can administer such oaths; and it seems highly unlikely that the legislature would have provided that other officers could administer such oaths if the oaths were to be made only at the office of the recorder of deeds.

We conclude that the provision in subsection 2 of Section 451.090 which requires that consent shall be given at the time of the issuance of the license authorizing the marriage means only that consent must be given in writing and under oath before the issuance of the license. It does not require that the oath be given at the office of the recorder of deeds at the same time the license is issued.

Obviously, as we have noted, a notary public does have the authority to administer such an oath. Further, if a notary public does administer the oath, it is obviously not necessary that the consenting parent appear before the recorder.

Very truly yours,

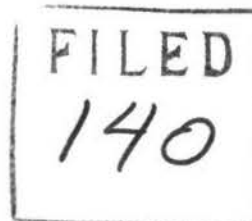


JOHN C. DANFORTH  
Attorney General

November 23, 1976

OPINION LETTER NO. 140  
Answer by letter-Mansur

Honorable Steve Lampo  
Prosecuting Attorney  
Newton County  
P. O. Box 511  
Neosho, Missouri 64850



Dear Mr. Lampo:

This is in response to your request for an opinion from this office as follows:

"Section 49.277 (1) enacted by the 78th General Assembly during its Second Regular Session, 1976 provides in pertinent part as follows:

The County Court in ... Counties of the ... third class not having a Charter form of Government as part of the compensation of its employees may contribute to the cost of a plan ... (emphasis added)

- "1. Question: Does the definition of the word 'employees' as used hereinabove include elected officeholders of the County?
- "2. Question: If the word 'employees' as used hereinabove does include elected officeholders of the County is the compensation under this statute in addition to or a part of the salary provided for in the statutes providing for salaries of the various officeholders?"

Honorable Steve Lampo

Newton County is a third class county not having a charter form of government.

You refer to Section 49.277 as enacted by the 78th General Assembly, Second Regular Session, which provides in part as follows:

"49.277. 1. The county court in all counties of the second and third classes and counties of first class not having a charter form of government as a part of the compensation of its employees may contribute to the cost of a plan, including a plan underwritten by insurance, for furnishing all or a part of hospitalization or medical expenses, life insurance, or similar benefits for its employees, and to appropriate and utilize its revenues and other available funds for these purposes." (Emphasis supplied)

First of all, it is our view that the provision of Section 49.277, which refers to the county court and "its employees," was intended to include all county employees and is not restricted to the limited meaning of only employees of the county court because such a restrictive interpretation would render the provision almost meaningless.

You inquire whether the word "employees" as used in Section 49.277 includes elective officeholders of the county.

We have been unable to find any court decision in this state passing on this question. In 63 Am.Jur.2d Public Officers and Employees § 11, the general rule of law is stated as follows:

"Public office, as hereinbefore defined and characterized, is in a sense an employment, and is very often referred to as such. But there is a distinction between a public office and a public employment, which is not always clearly marked by judicial expression and is frequently shadowy and difficult to trace. The distinction, however, is one which in many instances becomes important and which the courts are called upon to observe. Although every public office may be an employment, every public employment is not an office, and constitutional, statutory, and charter provisions referring to 'employees' or 'workmen' have generally been construed as not including public officers.

Honorable Steve Lampo

However, a charter or statute declaring that as used therein, the term 'employee' shall include public officers, has been held effective to extend the application of the term 'employees' so as to include public officers."

We know in this respect that it is not uncommon for the legislature to state concisely its intention to include officers and employees by specific provisions to that effect. Compare the provision of the Tort Defense Fund, Section 105.710, RSMo Supp. 1975.

In the absence of specific statutory provisions to the effect that county officers are to be considered as employees in the meaning of the above statute, it is our view that they are not to be included.

It is our view that Section 49.277 was intended to permit the county court to furnish such insurance to its employees as a part of compensation in addition to that compensation which may already be provided for by law or pursuant to law.

Before this last amendment to Section 49.277, that section provided that a county court in counties of the first class not having a charter form of government may provide such insurance as compensation for its employees. The amendment, of course, added counties of the second and third classes. Clearly not all counties are covered by Section 49.277, as amended. However, in our Opinion No. 61 dated January 23, 1975, to Bild, this office enclosed Opinion No. 93 dated September 9, 1969, to Cason and No. 11 dated April 6, 1971, to Copeland and expressed our view that Section 49.277 did not prevent those counties not mentioned therein from providing such insurance as a part of the compensation of the employees pursuant to the views expressed in such opinions. Copies of these opinions are enclosed.

We wish to make it clear, however, that, if the insurance is to be provided under the compensation theory and not under Section 49.277, when the law requires that the employee's salary be paid in a fixed amount in cash there is clearly no right in the governing body to provide for payment of insurance premiums out of the salary provided for by law.

In summary and in direct answer to your question, we conclude that Section 49.277, as amended, refers only to employees and not to elected officers of the county and that Section 49.277 does not prohibit a county which is not mentioned therein

Honorable Steve Lampo

from furnishing insurance consistent with the opinions we have cited.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 61  
Bild, 1-23-75  
  
Op. No. 93  
Cason, 9-9-69  
  
Op. No. 11  
Copeland, 4-6-71

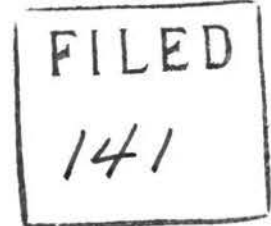
STATE FUNDS:  
STATE AUDITOR:  
WORKMEN'S COMPENSATION:

Income earned from investment of money in the Workmen's Compensation Fund, Section 287.710, RSMo, is required to be credited to that fund.

OPINION NO. 141

August 6, 1976

Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This opinion is in response to your request as follows:

"Is investment income, earned from the Workmen's Compensation Fund, Section 287.710, RSMo, required to be credited to that Fund or to general revenue?"

The Workmen's Compensation Fund (the Fund) is established in Section 287.710, RSMo Supp. 1975 (see Section 287.147 for reference). Section 287.710.4 states:

"The tax collected for implementing the workmen's compensation fund under the police power of the state from those specified in sections 287.690, 287.715, and 287.730 shall be used for the purpose of making effective the law to relieve victims of industrial injuries from having individually to bear the burden of misfortune or becoming charges upon society and for the further purpose of providing for the physical rehabilitation of the victims of industrial injuries, and for no other purposes. It is hereby made the express duty of every person exercising any official authority or responsibility in and for the state of Missouri sacredly to safeguard and preserve all funds collected under and by virtue of sections 287.690, 287.715, and 287.730 for the purposes hereinabove declared."

Section 30.240, RSMo, states:



Honorable George W. Lehr

"The state treasurer shall hold all state moneys, all deposits thereof, time as well as demand, and all obligations of the United States government in which such moneys are placed for the benefit of the respective funds to which they belong and disburse the same as authorized by law. All yield, interest, income, increment, or gain received from the time deposit of state moneys or their investment in obligations of the United States government shall be credited by the state treasurer to the general revenue."

The quoted language of Section 287.710.4 raises a question of legislative intent concerning whether interest earned on investment of the Fund is required to be credited to the Fund or to general revenue, pursuant to Section 30.240, RSMo.<sup>1</sup>

This office has previously held that a statute, which created a specific fund, and which included express language requiring all interest and income earned through operation of the fund to be credited to the fund, prevails over the requirements of Section 30.240, RSMo. Opinion Letter No. 76, Jaeger, January 13, 1971 (copy enclosed). The reasoning of that opinion was that the section in question, Section 253.360(1), RSMo, related to a specific fund and was enacted subsequent to Section 30.240.

The previously-quoted language of Section 287.710.4 does not contain a comparable express requirement to credit earned interest to the Fund. However, it does contain language limiting the use of the fund to the stated purposes "and for no other purposes." It contains additional language charging all responsible officials ". . . to safeguard and preserve all funds collected . . . for the purposes hereinabove declared."

Therefore, we look to other precedent. In the case of State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973), the

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<sup>1</sup>Because of the conclusion reached in this opinion, it is unnecessary to consider the interpretation question implied by the court in State Highway Commission v. Spainhower, 504 S.W.2d 121, 125 (Mo. 1973). In that case, the court implied that the term "general revenue," as used in Section 33.240, RSMo, was susceptible to an interpretation as constituting collectively all funds maintained by the State Treasurer and not, as traditionally viewed, constituting one general fund separate from the other specially created funds.

Honorable George W. Lehr

Missouri Supreme Court considered the issue of whether interest earned on the state road fund should be credited to that fund or to general revenue. In concluding that interest should be credited to the state road fund, the court relied on language in Article IV, Section 30(b) of the Missouri Constitution which stated the revenues ". . . shall be credited to a special fund . . . for the following purposes, and no other: . . ." The court stated at page 125:

". . . With the state road fund so restricted against transfer or use for any other purpose, interest or income from such fund must be credited to that fund under Article IV, Section 15, and held against withdrawal or use for any purpose other than state highway purposes, including diversion to the general revenue fund."

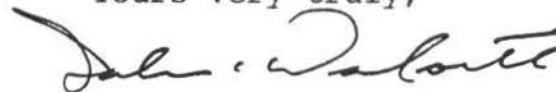
As seen, the language pertaining to the two funds is extremely similar. In general, a constitutional provision is subject to the same rules of construction as statutes, with due regard being given to the broader scope and objects of the Constitution. State ex inf. Martin ex rel. Binger v. City of Independence, 518 S.W.2d 63 (Mo. 1974); Wring v. City of Jefferson, 413 S.W.2d 292 (Mo.Banc 1967); State ex rel. Curators of the University of Missouri v. Neill, 397 S.W.2d 666 (Mo.Banc 1966). Therefore, we conclude that the same conclusion reached in State Highway Commission, supra, must result under the facts presented.

#### CONCLUSION

It is the opinion of this office that income earned from investment of money in the Workmen's Compensation Fund, Section 287.710, RSMo, is required to be credited to that fund.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op.Ltr.No. 76  
Jaeger, 1-13-71



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

July 27, 1976

OPINION LETTER NO. 144

Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This letter is in response to your opinion request in which you ask:

- "1. May a petition to nominate an independent candidate for the Office of President - Vice President of the United States be filed with the Office of the Secretary of State for the purpose of placing the name of the nominee on the Missouri General election ballot November 2, 1976?
- "2. If the answer is yes to question number one above; then 1. What is the last day such a petition may be filed with the Secretary of State, and  
2. Are the names of the Presidential electors required to be named on the petition. Further, if names of the Presidential electors are required to be listed on the petition how are vacancies filled in the event of withdrawal, resignation or death?"

You also state that:

"The Office of Secretary of State expects a petition to be filed to nominate an independent candidate for the Office of President-

Honorable James C. Kirkpatrick

Vice President of the United States. Sections 120.220 and 120.240, RSMo appear to establish two different dates for the filing of petitions to nominate an independent candidate. Therefore, in order to expedite the handling of such a petition and in order to advise petitioners as to the last filing date for petitions to nominate an independent candidate this request is most urgently presented."

It is also our understanding that your question does not concern the formation of a new political party under the provisions of Section 120.160, RSMo.

Presidential electors may be nominated by conventions of political parties under the provisions of Section 120.840 and persons may vote for the electors of such party under the provisions of Section 111.351 by voting for the presidential and vice presidential candidates of a party whose names are listed on the ballot. Presidential electors may also be nominated by petition. Section 120.200 provides that when presidential electors are nominated by petition the names of candidates for President and Vice President may be added to the party names. Section 120.210 provides that the petition of nomination shall include a statement of candidacy for each of the candidates except candidates for electors for President and Vice President. We deem it unnecessary to determine whether or not the names of independent candidates, that is, candidates for President and Vice President who do not purport to be candidates of any party, may appear on the ballot as is provided for in the case of party candidates because we have concluded below that the time has past for filing petitions nominating independent presidential and vice presidential electors. However, it appears doubtful that Missouri statutes provide for the names of independent candidates for President and Vice President to appear on the ballot. We believe that this question can be determined only by a court of competent jurisdiction.

In your second question you inquire about the filing deadline for candidates nominated by petition.

Section 120.220, RSMo, provides:

"Petitions of nomination for the nomination of candidates for offices in cities and other political subdivisions shall be filed with the clerk or other proper officer or board of the political subdivision at least sixty-eight days prior to the day of election. No

Honorable James C. Kirkpatrick

such petitions of nomination shall in any event be filed more than eighty-five days before the day of election."

Section 120.240, RSMo, provides:

"1. No person's name shall appear on a general election ballot as an independent candidate whose petition for such status shall not have been submitted to the proper officer by whatever time may be fixed by law as the final date for filing as a candidate in a party primary.

"2. No person may file both as an independent candidate and for any office in a party primary.

"3. Any person who has filed as an independent candidate may withdraw as a candidate by filing not later than August thirty-first before the general election a written, sworn statement of withdrawal in the office in which his petition was filed."

It is our view that Section 120.220 is not applicable inasmuch as such section refers only to petitions of nomination for candidates for offices in cities and other political subdivisions. We have held in the past in Opinion No. 134 dated May 17, 1972, that such section is in fact not even applicable to county offices. We enclose a copy of that opinion.

It is our view that Section 120.240 is the applicable section; and, therefore, the filing must be made at the time fixed by law as the final date for filing as a candidate in a party primary.

Section 120.340, RSMo Supp. 1975, provides in part:

"No candidate's name shall be printed upon any official ballot at any primary election unless the candidate has by 5:00 p.m. prevailing local time on the last Tuesday of April preceding the primary filed a written declaration of candidacy, . . ."

Under the provisions of Section 120.340, the last filing date for the August primary is 5 p.m. on the last Tuesday of April preceding such primary. We are, therefore, of the view that petitions

Honorable James C. Kirkpatrick

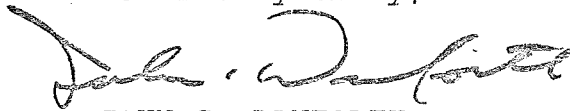
for the nomination of presidential electors cannot lawfully be filed in the state of Missouri after 5 p.m. on the last Tuesday of April preceding the August primary.

We are aware that an argument can be made that requiring independent candidates to file by the last Tuesday of April preceding the primary election is unconstitutional. See Salera v. Tucker, 399 F.Supp. 1258 (E.D. Pa. 1975) (affirmed without opinion by the United States Supreme Court, No. 75-595, March 22, 1976), in which Pennsylvania's requirement that petitions supporting independent candidates be filed 218 days before the general election was declared unconstitutional. See also, Storer v. Brown, 415 U.S. 724, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974), and American Party of Texas v. White, 415 U.S. 767, 39 L.Ed.2d 744, 94 S.Ct. 1296 (1974), which illustrate the limitations which the states may impose on the process of nomination of independent candidates.

However, we are without authority to determine whether the statutes we have relied on in reaching our conclusion are unconstitutional. See Gershman Investment Corp. v. Danforth, 517 S.W. 2d 33 (Mo.Banc 1974).

In view of the conclusion we reach with respect to the appropriate time for filing and since the petitions that you refer to have not been filed within the time required by law, we believe that it is unnecessary to answer the additional questions that you pose.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 134  
5-17-72, Gorman

MOTOR VEHICLES:

Section 2 of House Bill 1514, 78th  
General Assembly, Second Regular

Session, which provides that vehicles engaged in transporting solid waste as defined by Section 260.200, RSMo, between a city and a solid waste disposal area or solid waste processing facility approved by the Department of Natural Resources may operate with a weight not to exceed 22,400 pounds on one axle means that such weight is to be calculated per axle and the weight limitations imposed by Section 304.180, RSMo, are not applicable to such vehicles.

OPINION NO. 145

August 31, 1976

Mr. James McHenry  
Prosecuting Attorney  
Cole County, Courthouse  
Jefferson City, Missouri 65101



Dear Mr. McHenry:

This opinion is in response to your question asking:

"Does Section 2 of House Bill 1514, pertaining to operating weight of solid waste disposal vehicle, permit a tandem axle vehicle to carry up to 44,800 pounds?"

Section 2 of House Bill 1514, 78th General Assembly, Second Regular Session, which was approved by the Governor, June 24, 1976, provides as follows:

"Notwithstanding any other provision of law to the contrary, any truck, tractor trailer or other combination engaged in transporting solid waste, as defined by section 260.200, RSMo, between any city and a solid waste disposal area or solid waste processing facility approved by the department of natural resources or division of health (sic) may operate with a weight not to exceed twenty-two thousand four hundred pounds on one axle; provided, however, nothing in this section shall be construed to permit the operation of any motor vehicle on the interstate highway system in excess of the weight limits imposed by federal statute;

Mr. James McHenry

and provided further, that no such truck, tractor trailer or other combination shall exceed the width and length limitations provided in section 304.190, RSMo. The state highway department shall prescribe the route or routes to be traveled in the transporting of such solid wastes between any city and any solid waste disposal area or solid waste processing plant by any truck, tractor trailer or other combination having an axle weight greater than that otherwise permitted in the absence of this section." (Emphasis added)

We note that the language underscored is similar to that which the legislature used in Section 304.190, which pertains to motor vehicles operated within the corporate limits of cities containing 75,000 inhabitants or more or within two miles of the corporate limits of the city or within the commercial zone of the city. That is, subsection 2 of Section 304.190 provides that no motor vehicle operating exclusively within the area as provided shall have a greater weight than 22,400 pounds on one axle.

In State v. Chadeayne, 323 S.W.2d 680 (Mo.Banc 1959), the Supreme Court held that Section 304.190 is a separate code and that the other limitations with respect to weight provided for in Section 304.180, RSMo, are not applicable to vehicles coming under Section 304.190.

The question in this case then is whether or not Section 2 of House Bill 1514 is exclusive and a separate code or whether Section 304.180, RSMo, is also applicable with respect to tandem axles. It is our understanding that Section 2 of House Bill 1514 was enacted with the thought in mind that solid waste vehicles have problems which are not in common with other vehicles in that the weight of such vehicles varies according to the type of solid waste and the moisture content. Likewise, solid waste trucks have a basic weight which is greater than most other trucks because of the compacting equipment and are said to have a practical limitation on the number of axles which can be used because of the need of maneuverability. With this in mind, we note that House Bill 1514 imposed the 22,400 pound limitation on each axle although there was no gross weight imposed nor was there any breakdown with respect to weight limits on what is defined as tandem axles under Section 304.180. The limitations with respect to length and width are expressly, under Section 2 of House Bill 1514, as provided in Section 304.190, RSMo.



Mr. James McHenry

Further, under House Bill 1514, the State Highway Department is given the authority to prescribe the routes to be traveled in transporting such wastes between any city and any solid waste disposal area or solid waste processing plant by any truck, tractor trailer or other combination having an axle weight greater than that otherwise permitted in the absence of the provisions of Section 2.

While we believe Section 2 of House Bill 1514 leaves a great deal to be desired in draftmanship, the rules of construction concerning the necessity of interpreting statutes consistent with the legislative intent lead us to the conclusion that the weight limitation as provided under Section 2 is 22,400 pounds on one axle and that such a weight limitation is per axle regardless of whether the axles may be defined as tandem axles under Section 304.180. Therefore, we conclude that the weight limitations reached are calculated on the basis of 22,400 pounds per axle or in multiples thereof.

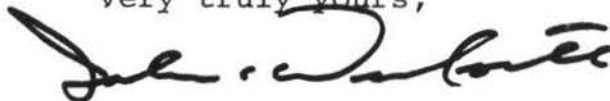
We point out that, as provided in Section 2 of House Bill 1514, nothing in that section shall be construed to permit the operation of any motor vehicle on the interstate highway system in excess of the weight limits imposed by federal statute.

#### CONCLUSION

It is the opinion of this office that Section 2 of House Bill 1514, 78th General Assembly, Second Regular Session, which provides that vehicles engaged in transporting solid waste as defined by Section 260.200, RSMo, between a city and a solid waste disposal area or solid waste processing facility approved by the Department of Natural Resources may operate with a weight not to exceed 22,400 pounds on one axle means that such weight is to be calculated per axle and the weight limitations imposed by Section 304.180, RSMo, are not applicable to such vehicles.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

COUNTIES:  
COUNTY COURT:  
COUNTY BUILDINGS:

Under Section 49.370, RSMo, the county court shall designate the place on which county buildings are to be erected at the seat of justice, and under Section 49.380, RSMo, the superintendent of county buildings appointed under Section 49.330, RSMo, has the authority to select a place anywhere within the corporate limits of the town known as the county seat if there is no suitable ground for the purpose intended belonging to the county within the limits of the original town known as the established seat of justice.

OPINION NO. 146

August 17, 1976

Mr. Jerome E. Brant  
County Counselor, Clay County  
17 East Kansas Street  
Liberty, Missouri 64068



Dear Mr. Brant:

This opinion is in response to your question asking as follows:

"Is it within the power of the Clay County Court to purchase a site and construct administrative offices and/or jail upon same, if the site is outside of the original seat of justice, or the seat of justice as it might have been increased up to and including the year of 1945?"

You also state:

"Clay County, Missouri, a first class county without a charter form of government, which has experienced rapid growth within the past several years, is in need of new jail facilities, administrative offices, and potentially in the future, of additional court rooms. Sites for this new construction have been considered within the original seat of justice, and within areas annexed to the City of Liberty, Missouri which contains the county seat or seat of justice, which said annexations have occurred since 1945.

Mr. Jerome E. Brant

"This question has been raised by various concerned parties. It came to the attention of the County Court. The County Court requested that the County Counselor prepare a request for an Attorney General's opinion so that we might have that opinion before proceeding to consider the various potential sites.

"The original seat of justice was accepted by commissioners at the time of the founding of Clay County in 1823. This original seat of justice contained fifty acres of land.

"County offices, court house and jail have been since that time within the confines of this limitation. The City of Liberty, Missouri annexed certain additions to the City of Liberty from that time until 1945, but has experienced substantial additional land acquisitions since 1945.

"A copy of the 50-Acre grant of land for the seat of justice in Clay County is attached."

Prior to the enactment of the Constitution of 1875, the Missouri Supreme Court in State ex rel. Norman v. Smith, 46 Mo. 60 (1870) held that the seat of justice in a county is the place originally selected in pursuance of law and cannot be subsequently removed to a site within the extent of the town limits. Thus, at that time, an addition to a county seat was not considered to be the established seat of justice within the purview of the statute.

However, the provisions of the 1875 Constitution, Article IX, Section 2, provided:

"The General Assembly shall have no power to remove the county seat of any county, but the removal of county seats shall be provided for by general law; and no county seat shall be removed unless two-thirds of the qualified voters of the county, voting on the proposition at a general election, vote therefor; and no such proposition shall be submitted oftener than once in five years. All additions to a town which is a county seat shall be included, considered and regarded as part of the county seat." (Emphasis added)

Mr. Jerome E. Brant

In Babcock v. Hahn, 75 S.W. 93 (1903), the Missouri Supreme Court held that under the express provisions of the 1875 Constitution quoted above, the office of the recorder of deeds could be removed to any place within the city limits including a place within an addition to the city which was not a part of the original seat of justice.

At the time of the 1944 Constitutional Convention the delegates retained the previous constitutional prohibition against the removal of the county seat unless by two-thirds vote of the qualified voters of the county voting on the proposition at a general election but omitted the provision of the 1875 Constitution which we have quoted above. Article VI, Section 6. In doing so it was stated by Mr. Bradshaw, one of the delegates, that the revision did not change the fundamental provisions of the 1875 Constitution. After quoting in full the provisions of Article IX, Section 2 of the 1875 Constitution, the delegate stated:

"We are omitting as surplusage, the section as we have it drafted, retaining the essential provisions of the old section."  
(Debates, Second Typing, p. 2067)

Clearly a remark made at the Constitutional Convention is not binding upon the courts. However, it is worthy of consideration in attempting to resolve ambiguities that may exist. Gartenbach v. Board of Education of the City of St. Louis, 204 S.W.2d 273 (Mo. 1947). The debates of the Constitutional Convention therefore clearly indicate that no change was intended but that only "surplusage" was to be removed.

Further, it is doubtful that the delegates to the Constitutional Convention intended to render invalid Section 49.380, RSMo, which was enacted prior to the adoption of the 1945 Constitution and which permits the superintendent of buildings appointed by the county to select a suitable site within the corporate limits of the town known as county seat for county buildings when none is available within the limits of the "original town known as the established seat of justice." That is, under Section 49.310, RSMo, the county court, with certain exceptions not relevant here, is required to erect at the established seat of justice a "court-house, jail and necessary fireproof buildings for the preservation of the records of the county." Under Section 49.330, RSMo, the county court has authority to appoint some suitable person to superintend the erection of buildings. And Section 49.370, RSMo, provides:

"The county court shall designate the place whereon to erect any county building,

Mr. Jerome E. Brant

on any land belonging to such county, at the established seat of justice thereof."

Further, Section 49.380, RSMo, provides if there is no suitable ground for that purpose belonging to said county within the limits of the original town known as the established seat of justice, the superintendent shall select a proper piece of ground anywhere within the corporate limits of the town known as the county seat, and may purchase or receive by donation a lot or lots of ground for that purpose, and shall take a good and sufficient deed in fee simple for the same to the county, and shall make report of his proceedings to the circuit court at its next sitting.

We note also that Section 49.520, RSMo Supp. 1975, provides:

"Whenever the governing body of any first class county finds it necessary for the public need or convenience, or for the preservation of the public records to build, repair or remodel a courthouse, office buildings, court buildings or other public buildings in the county or to purchase, construct or extend buildings and the land upon which the buildings are situated, to be used by the county for courthouses or other proper county purposes, the county is authorized and empowered to purchase, construct or extend courthouses, office buildings, court buildings, and other buildings used for county purposes upon its own land or to acquire by purchase the land upon which the buildings are to be built."

We are of the view that this section must be read in light of Article VI, Section 6 of the Constitution which provides that no county seat shall be removed except by a vote of two-thirds of the qualified electors of the county voting thereon and together with the statutes we have noted above respecting the location of county buildings. Thus, we do not believe that Section 49.520 constitutes authority for the county court of a first class county to erect such buildings any place in the county except the county seat. In reaching this conclusion we have taken into consideration the fact that the original purpose of this section and other sections originally enacted with it in the Laws of 1961, p. 278, was to authorize the issuance of revenue bonds for such purposes.



Mr. Jerome E. Brant

We are of the view that the provisions of Article VI, Section 6 of the 1945 Constitution must be interpreted to define the county seat as being anywhere within the corporate limits of the town known as the county seat and that such definition should not be restricted to the original town known as the established seat of justice. Thus, under our interpretation county buildings could be located under the authority and conditions of Section 49.380 anywhere within the corporate limits of the town known as the county seat. Any other conclusion would render invalid the provisions of Section 49.380. It is a well-settled principle of constitutional construction that only when there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to be void. In the Matter of Burris, 66 Mo. 442, 450 (1877); Borden Co. v. Thomason, 353 S.W.2d 735, 743 (Mo. 1962).

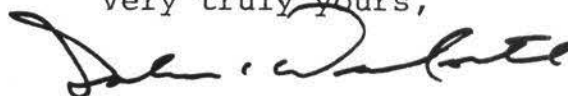
We conclude that the term "county seat" as used in Article VI, Section 6 of the Missouri Constitution of 1945 includes not only the original town known as the established seat of justice but also any additions to the town. We conclude that Section 49.380 is constitutional and that it is clearly within the province of the legislature to require that county property be located within the limits of the original town known as the established seat of justice unless it is determined that no suitable ground for the purpose intended is within such limits in which case the superintendent has the authority to select a piece of ground anywhere within the corporate limits of the town known as the county seat.

#### CONCLUSION

It is the opinion of this office that under Section 49.370, RSMo, the county court shall designate the place on which county buildings are to be erected at the seat of justice, and under Section 49.380, RSMo, the superintendent of county buildings appointed under Section 49.330, RSMo, has the authority to select a place anywhere within the corporate limits of the town known as the county seat if there is no suitable ground for the purpose intended belonging to the county within the limits of the original town known as the established seat of justice.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

October 8, 1976

OPINION LETTER NO. 148  
Answer by Letter - Klaffenbach

Honorable George E. Murray  
State Senator, 26th District  
763 New Ballas Road South  
Creve Coeur, Missouri 63141



Dear Senator Murray:

This letter is in response to your question asking as follows:

"Does the approval on April 7, 1976, by the City Council of the City of Bridgeton, of a contract for a Public Officials Liability Policy (specimen form attached), to become effective immediately upon execution, constitute 'additional compensation' and violate either Article VII, Section 13 of the Missouri Constitution or Section 3.03 of the Bridgeton City Charter quoted under paragraph 4."

With respect to your question concerning whether or not the action of the city council violates the provision of the city charter, we wish to point out that we do not interpret it as being our function under Section 27.040, RSMo, to interpret the provisions of the city laws as they relate to city charters. We, therefore, adhere to our past practice and respectfully decline to interpret the charter of the City of Bridgeton.

Section 13 of Article VII of the Missouri Constitution which you also note in your request provides:

Senator George E. Murray

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

You have not advised us as to the precise form of the ordinance authorizing the purchase of the policy of insurance.

Under Section 19(a) of Article VI of the Missouri Constitution, a charter city has all the powers which the General Assembly has authority to confer upon any city, provided such powers are consistent with the Constitution of this state and are not limited or denied either by the charter as adopted or by statute. Such a city has in addition to its home rule powers all the powers conferred by law. We do not purport to determine whether or not any charter prohibitions exist.

Section 71.185, RSMo, provides that municipalities may carry liability insurance and pay premiums therefor to insure such municipalities and their employees against claims or causes of action as provided therein. We believe that such section evidences the legislative intent with respect to all cities, and since a charter city has legislative powers within the framework of Section 19(a) of Article VI, we see no reason why a charter city would be prohibited from providing liability insurance for its officers as well as for the governmental entity itself by proper ordinance directed to that purpose.

We note that you have furnished us with a specimen copy of the policy of public officials liability insurance involved. We do not, however, purport to interpret such policy or to pass upon the provisions of the coverage or exclusions contained therein.

We conclude that a charter city has authority to provide liability insurance for its officers and employees and that the furnishing of such insurance does not constitute additional compensation unless the ordinance authorizing such insurance provides that the coverage is furnished as additional compensation for such officers or employees.

Under the doctrine of the Gershman Investment Corporation v. Danforth, 517 S.W.2d 33 (Mo. Banc 1974), we assume the constitutionality of Section 71.185 and the action of a constitutional charter city enacting similar provisions.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



TAXATION (SALES & USE):

The Director of Revenue does not have the right or duty to grant a use tax exemption in the case in which an individual transfers motor vehicles to a corporation in which he owns one hundred percent of the stock and the corporation assumes the outstanding liability on said motor vehicles.

OPINION NO. 149

October 6, 1976

Honorable George E. Murray  
State Senator, District 26  
763 New Ballas Road South  
Creve Coeur, Missouri 63141



Dear Senator Murray:

This official opinion is in response to your request for a ruling on the following question:

"Does the Director of Revenue have the right or duty to grant a use tax exemption in the case of title transfer of motor vehicles from an individual to a corporation in which he owns 100% of the stock, where the corporation simultaneously assumes liability for the pledged debt on such vehicles but did not receive any stock, cash or other consideration, in a transfer recognized under Section 351 of the Internal Revenue Code of 1954, and where no taxable gain or loss is realized by either the individual or the corporation?"

In your request you set out the following facts:

"An individual owns 100% of the stock of a corporation which has poor credit. The individual purchases certain vehicles, paid the sales taxes of \$26,481.00 on them, and leased them to the corporation on a net cost basis. Several years later the corporation achieved financial stability and the banks agreed to let the corporation assume liability for all indebtedness in the vehicles and release the individual. The actual book value of the vehicles at

Honorable George E. Murray

time of transfer was \$329.00 in excess of liability assumed. The corporation did not pay anything to the individual -- no cash, stock or other consideration.

"Under generally accepted accounting principles, the C. P. A. firm recorded the transferred assets on the corporate books at \$500,000 (fair market value) rather than the then book value of approximately \$200,329, or the \$200,000 in assumed liabilities. The I. R. S. has treated the \$300,000 excess as a non-taxable contribution to capital. This is a recognized Section 351 transfer, tax-free.

"Your further attention is directed to Section 144.450, R. S. Mo., which states in part 'The tax imposed by Section 144.440 shall not apply to motor vehicles on account of which the sales taxes provided by Section 144.010 & 144.510 shall have been paid.'

"Notwithstanding this, the Missouri Department of Revenue requested the corporation to pay use taxes on the title transfer and declined to issue an exemption certificate."

It must be pointed out, ab initio, that while taxing statutes are generally construed in favor of the taxpayer, tax exemption statutes are construed strictly against the taxpayer. Tiger v. State Tax Commission, 277 S.W.2d 561 (Mo. 1955); American Bridge Co. v. Smith, 179 S.W.2d 12 (Mo. 1944). It follows, then, that unless there is a specific tax exemption authorized by statute, the Director of Revenue cannot grant such an exemption.

Section 144.440.1, RSMo 1969, provides that:

"In addition to all other taxes now or hereafter levied and imposed upon every person for the privilege of using the highways of this state, there is hereby levied and imposed a tax equivalent to three percent of the purchase price, as defined in section 144.070, which is paid or charged on new and used motor vehicles and trailers purchased or acquired for use on the highways of this state which are required to be registered under the laws of the state of Missouri."

Honorable George E. Murray

Section 144.070.2, RSMo 1969, defines purchase price in the following manner:

"As used above, the term 'purchase price' shall mean the total amount of the contract price agreed upon between the seller and the applicant in the acquisition of said motor vehicle or trailer, regardless of the medium of payment therefor."

In National Dairy Products Corporation v. Carpenter, 326 S.W.2d 87, 90 (Mo. 1959), the court provided a further explanation of the term purchase price:

". . . The words 'purchase price' may be found in each of the first three subsections of Sec. 144.440, supra. The words 'purchase price' imply a sale or a contract of exchange. The purchase price is the consideration paid for an object involved in a sale. . . .

". . . As we understand that definition, it means that the tax levied by Sec. 144.440, supra, applies to all transactions where a motor vehicle is the subject of an exchange or sale contract. . . ."

From the foregoing, it is apparent that the use tax imposed under Section 144.440 applies in all cases in which a motor vehicle, used or new, is exchanged for consideration. Moreover, the statutory definition of purchase price indicates that the medium of payment of the consideration is of no consequence.

In addition, the Supreme Court of Missouri held in Swiss-American Importing Company v. Variety Food Products Company, 436 S.W.2d 770, 774 (St.L.Ct.App. 1968), that a transfer of partnership property for corporate stock was a sale as that term is broadly defined. The court stated that:

"This exchange of partnership property for corporate stock was a 'sale' as that term is broadly defined. In Schulte v. Crites, Mo.App., 300 S.W.2d 819 [2], the court said: 'A sale ordinarily is defined as a contract to transfer property rights for money paid or promised to be paid, but the term is broad enough to include the transfer of property for any

Honorable George E. Murray

sort of valuable consideration.' And in Kennerly v. Somerville, 68 Mo.App. 222, l. c. 225, the court tersely said: 'Moreover, there is no substantial distinction between a sale and an exchange. In both cases the title is absolutely transferred and the same rules of law govern each.'" (Emphasis added)

In your hypothetical statement of facts, you state that the corporation assumed the stockholder's outstanding indebtedness on the vehicles. It is the opinion of this office that the assumption of this liability in exchange for the vehicles constitutes valuable consideration. Accordingly, the exchange constitutes a sale, as the term is generally defined and implied in the definition of "purchase price." Said exchange, then, is taxable under Section 144.440.

The question then is whether the transfer of the motor vehicles to the corporation is exempt from the use tax under Section 144.450, RSMo 1969. That provision reads as follows:

"In order to avoid double taxation under the provisions of sections 144.010 to 144.510, any person who purchases a motor vehicle or trailer in any other state and seeks to register it in this state shall be credited with the amount of any sales tax or use tax shown to have been previously paid by him on the purchase price of such motor vehicle or trailer in such other state. The tax imposed by section 144.440 shall not apply to motor vehicles or trailers on account of which the sales tax provided by sections 144.010 to 144.510 shall have been paid, nor to motor vehicles or trailers brought into this state by a person moving any such vehicle into Missouri from another state who shall have registered and in good faith regularly operated said motor vehicle or trailer in said other state at least ninety days prior to the time it is registered in this state, nor to motor vehicles or trailers acquired by registered dealers for resale, nor to motor vehicles or trailers purchased, owned or used by any religious, charitable or eleemosynary

Honorable George E. Murray

institution for use in the conduct of regular religious, charitable or eleemosynary functions and activities, nor to motor vehicles owned and used by religious organizations in transferring pupils to and from schools supported by such organization, nor where the motor vehicle or trailer has been acquired by the applicant for a certificate of title therefor by gift or under a will or by inheritance, and the tax hereby imposed has been paid by the donor or decedent, nor to any motor vehicle or trailer owned or used by the state of Missouri or any other political subdivision thereof, nor by an educational institution supported by public funds, nor to farm tractors."

This statutory provision specifically exempts from taxation any motor vehicle or trailer on account of which the sales tax shall have been paid. Keeping in mind the principle of statutory construction that exemption provisions are to be strictly construed against the taxpayer, the question is whether the payment of sales tax by the stockholder who later transferred the vehicles to a corporation in which he held one hundred percent of the outstanding stocks exempts the corporation from paying the use tax imposed under Section 144.440.

To properly understand this exemption, it is necessary to first consider the purpose of a use tax. In State ex rel. Transport Manufacturing & Equipment Co. v. Bates, 224 S.W.2d 996, 999 (Mo.Banc 1949), the court discussed the legislative intention as to the use tax imposed by Section 11412, Laws 1947, the predecessor of Sections 144.440 and 144.450:

". . . The legislative intention as to this use tax is to so complement the sales tax on motor vehicles that motor vehicles sold in or used in the state attain a parity of taxation for the support of the state government. Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814; Morrison Knudsen Co. v. State Board of Equalization, 58 Wyo. 500, 135 P.2d 927; In re Los Angeles Lumber Products Co., 45 F.Supp. 77. The two taxes are intended to and do bring about the same result. Each are taxes. Each are taxes upon an identical class of personal property. They tax



Honorable George E. Murray

different phases of the privilege of purchasing, owning and using motor vehicles upon the highways of the State. The payment of the sales tax or the payment of the use tax is a condition precedent to the issuance by the state to the owner of a title certificate to the motor vehicle. The payment of the tax in either instance (sales tax or use tax) brings about the same result, the right to be issued a Certificate of Title. As to each class of motor vehicles (those purchased within and those purchased without the state) the use tax but equalizes the State's burden of raising revenue."

It is clear from the foregoing that the use tax imposed under Section 144.440 compliments the state sales tax imposed under Sections 144.010 to 144.510. It is this office's opinion that the sentence in Section 144.450 which exempts motor vehicles or trailers from the use tax imposed under Section 144.440 on account of which the state sales tax shall have been paid precludes the imposition of the use tax when the purchase transaction has already been subjected to the sales tax. That is, this exemption preserves the complimentary nature of the use tax by foreclosing the imposition of both the use and sales tax on one purchase transaction. It does not, however, mean that once a sales tax has been imposed on the purchase of a motor vehicle or trailer, the state is foreclosed from imposing the use tax on subsequent purchases.

The response to your hypothetical set of facts, then, is that the transfer of motor vehicles to a corporation by an individual who owns one hundred percent of the stock of that corporation is subject to the use tax imposed under Section 144.440; and, the exemption in Section 144.450 (which states that the tax imposed by Section 144.440 shall not apply to motor vehicles on account of which the sales tax provided by Sections 144.010 and 144.510 shall have been paid) does not preclude the imposition of the use tax even though that individual paid sales tax on the initial purchase.

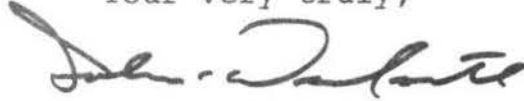
#### CONCLUSION

It is the opinion of this office that the Director of Revenue does not have the right or duty to grant a use tax exemption in the case in which an individual transfers motor vehicles to a corporation in which he owns one hundred percent of the stock and the corporation assumes the outstanding liability on said motor vehicles.

Honorable George E. Murray

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clarence Thomas.

Your very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

DENTISTS:

A graduate of a foreign dental school is qualified for examination and registration as a dentist in the state of Missouri under the provisions of Section 332.131, RSMo, only if the school is certified by the American Dental Association.

OPINION NO. 150

October 6, 1976

Honorable Frank Bild  
State Senator, 15th District  
7 Meppen Court  
St. Louis, Missouri 63128



Dear Senator Bild:

This is in response to your request for an official opinion of this office on the following question:

"Is a foreign dental school giving a comparable curriculum and course of study to its students as the dental schools of the United States an accredited dental school as referred to in Section 332.131 RSMo, 1969?"

Section 332.131, cited in your question, provides as follows:

"Any person who is at least twenty-one years of age, of good moral character and reputation, who is a graduate of and has a degree in dentistry from an accredited dental school, and who is a citizen of the United States of America may apply to the board for examination and registration as a dentist in Missouri." (Emphasis added)

The "board" referred to in the foregoing section is the Missouri Dental Board, Section 332.011(3), which is charged by law with administering and enforcing the provisions of Chapter 332, Dentistry, RSMo 1969.

In Chapter 332, an "accredited dental school" is defined as follows:



Honorable Frank Bild

" . . . any college, university, school, or other institution which teaches dentistry which has been certified by the American Dental Association;" Section 332.011(2)

It should be noted that this definition does not specifically exclude dental schools in foreign countries. However, in order for its graduates to qualify for a certificate of registration and license to practice dentistry in Missouri, a school must be accredited; therefore, it must be certified by the American Dental Association.

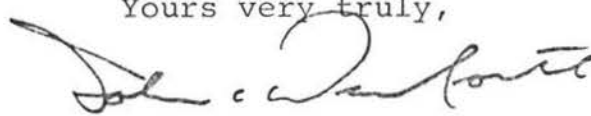
In your request, you refer to an applicant who is a graduate of Ahmadabad Dental College located in India. The Missouri Dental Board informs this office that at the present time the only dental schools outside the United States which have been certified by the American Dental Association are located in Canada and Puerto Rico. Therefore, this applicant is not qualified for examination and registration in Missouri because the dental school from which he graduated is not an accredited dental school as required by Section 332.131 and defined in Section 332.011(2).

#### CONCLUSION

It is the opinion of this office that a graduate of a foreign dental school is qualified for examination and registration as a dentist in the state of Missouri under the provisions of Section 332.131, RSMo, only if the school is certified by the American Dental Association.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Lucia K. Leggette.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

September 22, 1976

OPINION LETTER NO. 152

Col. Theodore D. McNeal, President  
Board of Police Commissioners  
City of St. Louis  
1200 Clark Avenue  
St. Louis, Missouri 63103

Dear Colonel McNeal:

This opinion letter is issued in response to your request for an official ruling on the following question:

Under Section 105.270, RSMo Supp. 1975, are regularly scheduled holidays, vacation days and/or recreation days which fall during a period of military leave to be rescheduled?

Section 105.270, RSMo Supp. 1975, reads in pertinent part:

"1. All officers and employees of this state, or of any department or agency thereof, or of any county, municipality, school district, or other political subdivision, and all other public employees of this state who are or may become members of the national guard or of any reserve component of the armed forces of the United States, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave, impairment of efficiency rating, or of any other rights or benefits, to which otherwise entitled, for all periods of military services during which they are engaged in the performance of duty or training in the service of this state at the call of the governor and as ordered by the adjutant general, and for all periods of

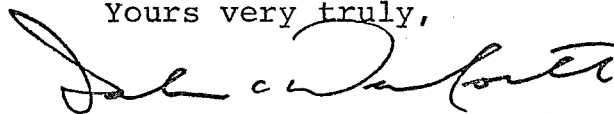
Col. Theodore D. McNeal

military services during which they are engaged in the performance of duty in the service of the United States under competent orders for a period not to exceed a total of fifteen calendar days in any one calendar year."

It is the opinion of our office, on the basis of this provision, that holidays and vacation days must be rescheduled but recreation days need not. (Recreation days are given to St. Louis City police officers in lieu of weekends because of the necessity of having police officers on duty at all times. An officer is entitled to six recreation days in each twenty-one day period.) We interpret regular leave to mean holidays and vacation days because on those days an employee receives a double benefit. He is paid but he is not required to work. If a holiday falls during an employee's military leave, he will still be paid but he will have lost his day off. In order to insure that the employee is not penalized for his military service, an agency must see that the holiday is rescheduled at some later time. On recreation days, however, an employee is not paid. Therefore, when a recreation day falls during a period of military leave, the employee has not lost a benefit he would have been entitled to if he were not on military leave.

Therefore, it is our view that Section 105.270, RSMo Supp. 1975, entitles patrolmen of the St. Louis City Police Department each calendar year to a maximum of fifteen military days with full benefits. Any holidays or vacation days which fall during that period will have to be rescheduled, but recreation days which fall during a period of military leave need not be rescheduled.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

August 16, 1976

OPINION LETTER NO. 153

Honorable Jack E. Gant  
Missouri Senate, 16th District  
Rural Route 2, Box 891  
Independence, Missouri 64056

Dear Senator Gant:

This letter is in response to your question asking:

"The question of law is: Whether or not a person who is convicted of driving while his operator's license has been suspended pursuant to Chapter 303 of Missouri Revised Statutes for failing to file a Safety Responsibility Report on an accident should be penalized by being assessed 12 points and having his license revoked under the penalty provision of Chapter 302, Missouri Revised Statutes, in particular section 302.302 or whether such a person should only be subject to the penalties expressly provided in Chapter 303 Missouri Revised Statutes which are on their face designed to apply to Chapter 303; or whether such a person is subject to the penalty of both Chapter 302 and Chapter 303."

In our Opinion No. 213 dated April 29, 1969 to Stubbs, this office held that a person who operates a motor vehicle when his driver's license is suspended under Chapter 303, RSMo, the Safety Responsibility Law, is in violation of Section 303.370, RSMo, and not Section 302.321, RSMo Supp. 1975. A copy of that opinion is enclosed.

Both of these sections, however, fix only the penalty for the respective offenses. As indicated in that opinion, Section

Honorable Jack E. Gant

303.370 fixes the penalty for the operation of a motor vehicle while the operator's license is under suspension for failure to comply with the Safety Responsibility Law. Section 302.321 fixes the criminal penalties for the operation of a motor vehicle while such operator's license has been suspended, cancelled or revoked under the provisions of Chapter 302 or Chapter 564, RSMo. Neither section deals with the point system which is covered separately under the provisions of Section 302.302, RSMo Supp. 1975.

That is, under subsection 1(5) of Section 302.302, twelve points are to be assessed by the Director of Revenue for the operation of a motor vehicle without a license after suspension or revocation and prior to restoration of operating privileges which have been suspended or revoked. Such section requires that the Director of Revenue put the point system into effect and that the points be assessed.

In our view, it makes no difference whether the suspension of the license came about because of a conviction under Section 303.370 or 302.321. Both statutes provide for suspension of operators' licenses. The point system, on the other hand, is not limited to the assessment of points for the operation of a motor vehicle without a license under only certain sections. The section plainly applies to operation without a license after suspension or revocation and prior to restoration of operating privileges which have been suspended or revoked. Clearly, subsection 1(5) of Section 302.302 which assesses the twelve points for a violation is applicable to any operation of a motor vehicle after suspension under the provisions of either of these sections.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 213,  
4/29/69, Stubbs

CONSTITUTIONAL LAW;  
MISSOURI COUNCIL ON THE ARTS;

The Missouri State Council on  
the Arts may contract with artists  
for workshops, lectures, demonstra-  
tions, performances and art objects without violating Article III,  
Section 38(a) of the Missouri Constitution.

OPINION NO. 155

October 8, 1976

Mr. Alfred C. Sikes  
Department of Consumer Affairs,  
Regulation and Licensing  
505 Missouri Boulevard  
Jefferson City, Missouri 65101



Dear Mr. Sikes:

This is in response to your opinion request in which you ask whether the provisions of Section 38(a) of Article III of the Missouri Constitution would prohibit the Missouri Council on the Arts from expending money appropriated by the legislature to contract with artists for lectures, demonstrations or performances or for the acquisition of art objects.

Article III, Section 38(a) of the Missouri Constitution provides in pertinent part:

The general assembly shall have no power to  
grant public money or property, . . . to any  
private person, association or corporation,  
. . . ."

That section does not prohibit the expenditure of public money for a public purpose. See, e.g., Americans United v. Rogers, Supreme Court of Missouri, No. 59410 (6-26-76). The question then becomes, is the proposed expenditure by the Missouri State Council on the Arts above a public purpose. The answer to this question in our opinion is clearly in the affirmative. Chapter 185 creates the Missouri State Council on the Arts. Section 185.040 lists the duties of the Council which in part are;

"(1) To stimulate and encourage throughout  
the state the study and presentation of the  
performing and fine arts and public interest  
and participation therein;

\* \* \*

Mr. Alfred C. Sikes

"(3) To take such steps as may be necessary and appropriate to encourage public interest in the cultural heritage of our state and to expand the state's cultural resources; and

"(4) To encourage and assist freedom of artistic expression essential for the well-being of the arts."

Section 185.050, RSMo, provides:

"The council is hereby authorized and empowered . . . to enter into contracts, . . . with individuals, . . . for services furthering the educational objectives of the council's program; . . . to make and sign any agreements and to do and perform any acts that may be necessary to carry out the purposes of this chapter. . . ."

It would not be unreasonable for the Council on the Arts to conclude that contracting with artists for the services indicated in your opinion request will serve to stimulate and encourage the study and presentation of the performing and fine arts and public interest participation therein; expand the public interest in the cultural heritage of our state and expand the state's cultural resources; and encourage and assist freedom of artistic expression central for the well-being of the arts. If the Council so concludes the contracts are authorized by Sections 185.040 and 185.050. The enactment of those sections indicates that the legislature considered the promotion of the arts in this state served a public purpose. In the Americans United case the question before the court was whether the Missouri Financial Assistance Program for Higher Education served a public purpose. In the majority opinion the court asked the rhetorical question: "Does the statutory program have a public purpose?" (emphasis in opinion). The court responded to this question stating, "Generally the answer could only be 'yes' and citation of authority is unnecessary, because Missouri has always given education the highest of priorities. . . ." It would not be unreasonable to view the entire purpose of the Missouri Council on the Arts as being educational and thus its activities clearly serve a public purpose. However, it is not necessary to justify the public purpose of the Council on educational grounds alone. In the Americans United case the court went on to note that;

Mr. Alfred C. Sikes

"Higher secular education today is unquestionably considered to be a contributing factor toward the betterment of society, and we find nothing in the constitution of this state prohibiting the legislative department from declaring the encouragement thereof a 'public purpose' . . . ."

We believe that the statement would be equally applicable if duties of the Council as contained in Section 185.040 were substituted for the words "higher secular education". The fact that individual artists will benefit by virtue of contracts with the Missouri State Council on the Arts does not destroy the public purpose of such contracts. As the court observed in Americans United:

"'. . . benefit is to be distinguished from purpose and incidental private benefit does not preclude a transcendant public purpose . . . the law is clear in Missouri that an overriding public purpose will not suffer constitutional death at the hands of incidental private benefit.' . . ."

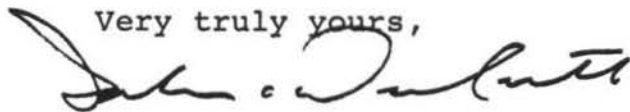
Therefore we find that there is no constitutional infirmity pursuant to Article III, Section 38(a) with respect to the Missouri Council on the Arts contracting with artists for services.

#### CONCLUSION

It is the opinion of this office that the Missouri State Council on the Arts may contract with artists for workshops, lectures, demonstrations, performances and art objects without violating Article III, Section 38(a) of the Missouri Constitution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



CLEAN WATER:  
REORGANIZATION LAW:

The initial responsibility for issuing Clean Water Commission permits under Section 204.051, RSMo Supp.

1975, rests with the Director of the Department of Natural Resources acting in his capacity of administering Department of Natural Resources programs relating to environmental control and executing policies established by the Clean Water Commission.

OPINION NO. 156

August 18, 1976

Mr. James L. Wilson, Director  
Department of Natural Resources  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This is in reply to your request for an opinion concerning the procedure for issuance of Clean Water Commission permits. Specifically, your question asks:

"Under the Missouri Clean Water Law, as affected by reorganization, who has the initial responsibility for the issuance of permits under Section 204.051 RSMo. Supp. 1975?"

Your question is affected partially by the Omnibus State Reorganization Act of 1974. Primarily, however, the basic problem is initiated by what may, on the surface, appear to be conflicting provisions in Chapter 204. Section 204.026(13) provides generally that the Commission shall issue permits for the discharge of water contaminants into the waters of the state. Then, in subsections 3, 4, 5, 6, 7, and 8 of Section 204.051, a rather detailed procedure for the application and issuance of permits is provided.

In subsection 3 of Section 204.051, it provides generally that applications are to be made with the "executive secretary" who shall promptly investigate each application and this investigation would include any hearings that circumstances may require. It is then provided that the executive secretary has the authority to issue permits or to deny permits. In subsection 6, it is provided that if the executive secretary denies an application for a permit, appeal may be taken to the Commission. On such appeal, the Commission then has the authority to investigate and hold hearings and then may issue or deny the permit.

Mr. James L. Wilson

By a prior Attorney General's Opinion No. 235 dated June 18, 1974, we have held that under the State Reorganization Act the Director of the Department of Natural Resources is the successor to all statutory powers of the executive secretary. Accordingly, in all cases which have so far come to our attention, wherever reference is made to the executive secretary it means Director of the Department. We see nothing which would dictate a different result in this instance.

This leads to the basic problem: Is the permit issued by the Commission or by the Director? The Reorganization Bill, which transferred the Clean Water Commission by type II transfer to the Department, explicitly provides that the Commission shall remain as the policy making body for water pollution matters. The relationship stated in that Act between the Commission and the Director is that the Director:

". . . shall administer the programs assigned to the department relating to environmental control and the conservation and management of natural resources. . . ." Section 10.1, Appendix B, RSMo Supp. 1975

Additionally, that Act states that the Director ". . . shall faithfully cause to be executed all policies established . . ." (Section 10.1, Appendix B, RSMo Supp. 1975) by the Clean Water Commission and be subject to the Commission's decisions as to all substantive and procedural rules. Accordingly, it is our view that the Commission has the basic authority and responsibility as it relates to policies.

The Commission establishes policy with its rules and regulations which are the basic guidelines under which permits are issued and also, specifically with regard to permits, its decisions on permit appeals. The effectuation of policy through such rules and regulations then sets down the guidelines under which the Director acts in the issuance of permits. However, if the rules are not completely definitive, as they would not ordinarily be, there would then exist some discretion on the part of the Director in the issuance of individual permits. Nevertheless, they must remain within the general guidelines of the rules; and the Commission's check on this as well as on finer points of policy is the permit appeals process.

Therefore, when the Director initially issues the permit, it is on behalf of the Commission, as the administrative officer directed to carry out the policies of the Commission. The permits in the broad sense are the permits of the Commission; but in construing Section 204.026(13) with Section 204.051.3, it is apparent that the

Mr. James L. Wilson

procedural way that the Commission issues its permits is first to have the Director review such matters, investigate if necessary, and then issue or deny permits.

This scheme recognizes that procedurally one person, or group of persons who form a commission or other body, should not be the appellate authority for its own initial determinations.

"Administrative appeal is, in the nature of things, excluded where the determining authority is either a head of a department or an independent commission, but there is room for appeal where a subordinate of a department head, even the head of a bureau, is the determining authority. . . ."  
2 Am.Jur.2d Administrative Law § 541

and further:

"Where a statute provides for an application to and determination by one officer with provision for appeal from such determination to another officer or body or for review by such an officer or body, the reviewing body has been held to have jurisdiction to act only upon an appeal . . . ." 2 Am.Jur.2d Administrative Law § 542

To determine that the permit is to issue initially by the Commission would thus render meaningless the legislation's statutory scheme to assign the duty of investigation and permit issuance (formerly to the executive secretary before reorganization) to the Director, the administrative officer charged with administering Department of Natural Resources environmental control programs and carrying out Commission policies. It would further fail to recognize the legislature's apparent intent that there be a true appeal or review of the initial issuing authority's decision.

There is one interesting aspect of the permit which has been apparently amended by the Reorganization Bill. In subsection 6 of Section 204.051, it is provided that the applicant may appeal a denial of a permit by the "executive secretary" (whose duties are now performed by the Director) to the Commission. Subsection 1 of Section 10 of the Reorganization Act provides that the Director shall:

". . . be subject to their decisions as to all substantive and procedural rules and

Mr. James L. Wilson

his decisions shall be subject to appeal to the board or commission on request of the board or commission or by affected parties.  
. . . " (Emphasis added)

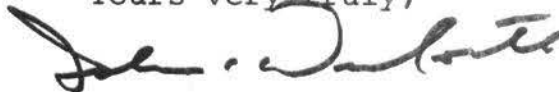
Accordingly, this would give to the Commission the authority to review any permit issued or denied by the Director, regardless of whether any other party appeals such decision.

#### CONCLUSION

It is the opinion of this office that the initial responsibility for issuing Clean Water Commission permits under Section 204.051, RSMo Supp. 1975, rests with the Director of the Department of Natural Resources acting in his capacity of administering Department of Natural Resources programs relating to environmental control and executing policies established by the Clean Water Commission.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert Lindholm.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

INSURANCE:

The requirements of Section 379.120, RSMo Supp. 1975, apply to insurers canceling automobile insurance policies which have been in effect for less than sixty days.

OPINION NO. 159

December 21, 1976

Honorable Sue Shear  
Representative, District 76  
200 South Brentwood Boulevard  
Clayton, Missouri 63105



Dear Representative Shear:

You have requested the opinion of this office as to the requirements imposed by statute on automobile insurance companies which cancel automobile insurance policies in force for less than sixty days.

Sections 379.010 to 379.120, RSMo Supp. 1975, pertain to cancellation and refusal to write insurance policies. Section 379.118 refers to cancellation of automobile insurance policies. However, "policy," as used in that section, is defined by Section 379.110(3) to be a "policy . . . which has been in effect for more than sixty days . . . ." Therefore, Section 379.118 would not be applicable to policies in effect for less than sixty days.

Section 379.120 pertains to the refusal by insurers to write policies. Since a contract of insurance does not become a "policy" for the purposes of Sections 379.010 to 379.120 until it has been in force for sixty days, the cancellation of an insurance policy which has been in effect for less than sixty days is the same as if the insurer had refused to write the policy. Therefore, Section 379.120 would apply to such cases. That section provides:

"If any insurer refuses to write a policy of automobile insurance, it shall, within thirty days after such refusal, send a written explanation of such refusal to the applicant at his last known address by certified mail. The explanation shall state:

(1) The insurer's actual reason for refusing to write the policy, the statement of reason to be sufficiently clear and specific so

Honorable Sue Shear

that a person of average intelligence can identify the basis for the insurer's decision without further inquiry. Generalized terms such as 'personal habits', 'living conditions', 'poor morals', or 'violation or accident record' shall not suffice to meet the requirements of this subdivision;

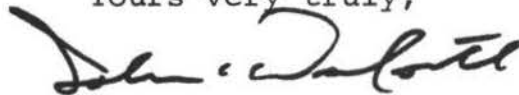
(2) That the applicant may be eligible for insurance through the assigned risk plan if other insurance is not available."

CONCLUSION

It is the opinion of this office that the requirements of Section 379.120, RSMo Supp. 1975, apply to insurers canceling automobile insurance policies which have been in effect for less than sixty days.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

November 23, 1976

OPINION LETTER NO. 160

Honorable James L. Russell  
Representative, District 6  
R.R. #3  
Savannah, Missouri 64485

Dear Representative Russell:

This is in response to your request for an opinion from this office as follows:

"1. Does the Presiding Judge of a County Court vote along with Associate Judges, when a decision is required, or only when the Associate Judges fail to agree?

"2. What if any, do the duties and opinions of a District Judge of a County Court differ from other members of the Court, in regard to issues pertaining to the specific district he or she represents?

"3. If the Presiding Judge is contacted on a matter such as a road condition of a District Judge, should he make the decision or refer them to the Judge in that District?

"4. Is the County responsible for mileage and lodging, when incurred by any one of the Judges going to any or all meetings he desires to attend; without first consulting the other Judges?"

We assume that the questions you have submitted concern the county court of Andrew County which is a third class county. Our opinion will deal with the law that applies to county courts in third class counties.

The answer to the questions you have submitted depend upon the law of this state that governs the action and authority of county



Honorable James L. Russell

courts of third class counties. County courts are not the general agents of the county or the state; their powers being limited and defined by law and having only such authority as expressly granted them by statute. King v. Maries County, 249 S.W. 418 (Mo. 1923). A county court performs its functions as a constituted body, and its members acting individually have no power to obligate the county. Missouri-Kansas Chemical Co. v. Christian County, 180 S.W.2d 735 (Mo. 1944). Carter v. Reynolds County, 288 S.W. 48 (Mo. 1926).

The first question you have submitted is whether the presiding judge of a county court has a right to vote on all matters being presented to the court when all the members are present or whether he has the right to vote only when the associate judges fail to agree.

Section 49.070, RSMo, provides as follows:

"A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent; when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge shall stand as the decision of the court; provided further, when the presiding judge is absent and the other two judges are present the county clerk shall designate one of such judges present as presiding judge during the absence of the regular presiding judge, and such judge shall, during the absence of the regular presiding judge, have all of the powers of the regular presiding judge."

We have been unable to find any appellate court decision in this state passing upon this question. In Hollis v. Weissenger, 135 S.W. 410 (Ct. App. Ky. 1911), the court held that the presiding judge of a county court had the same right to vote on questions coming before that body as may be exercised by the other members of the court and he was not limited to voting only in case of a tie vote of the other members.

It is our opinion that the presiding judge of a county court of a third class county has authority to vote on all matters pending before the court when all the members are present the same as the associate judges and the decision of the majority of the judges present constitutes the decision of the court. It is only when two



Honorable James L. Russell

of the judges are sitting and they disagree that the decision of the presiding judge shall stand as the decision of the court. Furthermore, we believe it is the responsibility of all the judges when sitting as a body to vote on all matters pending before the court since they have been elected by the people to represent them and the people are entitled to know the views and opinions of each of the judges concerning all matters submitted to the court.

State ex rel. Walton v. Miller, 297 S.W.2d 611 (K.C.Mo.App. 1956), concerned the oral agreement made by one of the judges of the county court concerning work to be performed by plaintiff for the county. In holding that the county court performs its duties as a body but not as individuals, the court stated, l.c. 614-615:

" . . . A majority of the county judges constitute a quorum, Section 49.070, provided that it is made at the proper time and place to transact the business. It is the duty of the county court to audit all claims against the county. Section 49.270. However, 'This, of course, means lawful demands against the county. It cannot be construed as giving authority to the county court to audit and settle claims against the county court arising under void contracts'. Hillside Securities Co. v. Minter, supra, 254 S.W. at page 193.

"When the two judges, Taylor and Salmons, while conversing in the corridors of the courthouse and without the presence, knowledge or consent of Miller, the presiding judge, and who, seemingly, was standing within easy call, undertook to make an oral agreement with Walton to do work for the county, they were acting in their individual capacity and they were not, under such circumstances, the authorized agents of the county respecting the transaction. 'A county court performs its functions as a constituted body. Its three members acting individually have no power to obligate the county'. Missouri-Kansas Chemical Co. v. Christian County, 180 S.W.2d at page 736. The same opinion states at same page: 'A county court is a court of record and speaks only through its records; verbal understandings with county judges are not valid. Boatright v. Saline County, 350 Mo.

Honorable James L. Russell

945, 169 S.W.2d 371; Carter-Waters Corporation v. Buchanan County, Mo.Sup., 129 S.W. 2d 914 and cases cited'. On a similar matter in Carter v. Reynolds County, 315 Mo. 1233, 288 S.W. 48, 50, the Supreme Court said: 'He was not an agent of the county "duly appointed and authorized in writing"; being merely a member of the county court did not constitute him an "agent authorized by law" to make contracts for the county. If all three of the judges of the county court had separately agreed with plaintiff that the county would pay him \$500 for driving piling in Black river, the county would not be bound. They could act for and obligate the county only when sitting as the county court. [citations]'. " (Emphasis supplied)

In answer to your second question of whether the duties and responsibilities of the district judge of the county court differ from other members of the court in regard to issues pertaining to the specific district he or she represents, it is our opinion that they do not. It is our opinion that the presiding judge and the associate judges represent the county at large and the duties and responsibilities of the associate judges are not confined or restricted to the district which he represents.

In answer to your question of whether the presiding judge, when he is contacted on a matter such as a road condition in a district of the associate judge, should make the decision or refer them to the judge in that district, it is our opinion that the matter has to be decided by all the members of the court and not left to the decision of the judge whether it be the presiding judge or the associate judge.

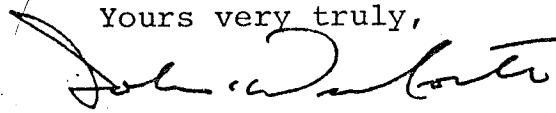
As heretofore stated, it is our opinion that the county court can transact business only when sitting as a court and not by individual decisions. County courts can speak only through their records and any action taken by the county court which is binding on the county has to be made a matter of record. State ex inf. Stephens v. Fletchall, 412 S.W.2d 423 (Mo.Banc 1967).

In your fourth question you inquire whether the county is responsible for mileage and lodging incurred by any one of the judges going to any or all meetings he desires to attend without first consulting the other judges. In answer to your fourth question, we are enclosing herewith Opinion No. 253 issued by this

Honorable James L. Russell

office on August 15, 1963, to James C. Skaggs and Opinion No. 350 and 351 amended December 31, 1975, to Haskell Holman. It is our view that any mileage or lodging can be reimbursed only if approved by the court while in session.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 253  
Skaggs, 8-15-63  
  
Op. No. 350 and 351  
Holman, 12-31-75



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

September 8, 1976

OPINION LETTER NO. 161

Mr. Alfred C. Sikes  
Department of Consumer Affairs,  
Regulation and Licensing  
505 Missouri Boulevard  
Jefferson City, Missouri 65101

Dear Mr. Sikes:

This is in response to your request for an opinion on the following question:

"Does the Director of the Department of Consumer Affairs, Regulation and Licensing have the authority to establish and set the rate of compensation for the Commissioner of the Administrative Hearing Commission?"

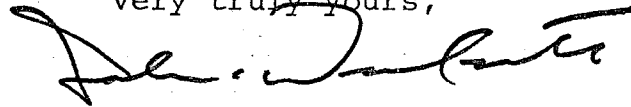
As you indicated in your opinion request, the Administrative Hearing Commissioner holds office for a six year term and the present term will expire in October, 1977. Article VII, Section 13 of the Constitution prohibits an increase of the compensation of a public officer during his term of office. The prohibition of that section refers to the fixed term set by statute and not to the individual who may happen to be the incumbent. State ex rel. Emmons v. Farmer, 196 S.W. 1106 (Mo.Banc 1917). Therefore, because of the constitutional prohibition contained in Article VII, Section 13, the salary of the Administrative Hearing Commissioner may not be increased during the present term.

The Administrative Hearing Commission was transferred to the Department of Consumer Affairs, Regulation and Licensing by a type III transfer pursuant to Section 4.(4) of the Omnibus State Reorganization Act of 1974. This office held in Opinion

Mr. Alfred C. Sikes

No. 53, March 18, 1975, that heads of state departments have authority under the Omnibus State Reorganization Act of 1974 to set the salary of division directors and other administrative positions of departments subject to legislative appropriations. Therefore, while the constitutional prohibition of Article VII, Section 13, prevents you from increasing the salary of the Administrative Hearing Commissioner during the term that will expire in October of 1977, you have authority to determine the salary pursuant to Section 7.6(2) of the Omnibus State Reorganization Act of 1974 for future terms.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 53,  
3/18/75, Garrett



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

August 16, 1976

OPINION LETTER NO. 163

Honorable John T. Russell  
Representative, District 150  
P. O. Box 97  
Lebanon, Missouri 65536

Dear Representative Russell:

This letter is in response to your question asking:

"Can a Special Business District established in accordance with Chapter 71.790 levy a business license tax within the District if the city where the Special Business District is located does not have a license business tax?"

You also state:

"The Special Business District has been formed in accordance with Sec. 71.790 and during the reading of the ordinance someone raised the question of the Special District being authorized to levy a business tax within the district if the City of Lebanon does not have a business license tax. See Sec. 71.800."

Subsection 2 of Section 71.800, RSMo Supp. 1975, provides:

"For the purpose of paying for all costs and expenses incurred in the operation of the district and the provision of services or improvements authorized in section 71.796, the district may impose an additional business license tax on businesses and individuals licensed to do business within the district which shall not exceed fifty percent of

Honorable John T. Russell

any existing license taxes levied by the governing body within the district. Whenever a hearing is held herein, the governing body shall hear all protests and receive evidence for or against the proposed action; rule upon all protests which determination shall be final; and may continue the hearing from time to time. Proceedings shall terminate if protest is made by businesses in the proposed area which pay a majority of the taxes within the area under the general business license tax. For purposes of the additional tax to be imposed pursuant to this part, the governing body of the city may make a reasonable classification of businesses, giving consideration to various factors."

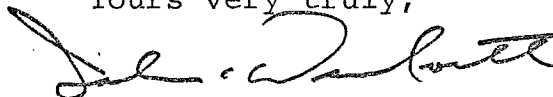
We believe the language of the subsection is quite clear. It provides for levy of a tax on:

". . . businesses and individuals licensed to do business within the district which shall not exceed fifty percent of any existing license taxes levied by the governing body within the district. . . ."

Therefore, the subsection is not only limited to a tax on businesses and individuals licensed to do business within the district, but the tax is also limited to fifty percent of any existing license taxes levied by the governing body within the district. We point out that under Section 71.790 the term "governing body" means the governing body of the city.

The answer to your question thus is that there would be no way for a special business district established in accordance with the provisions of Sections 71.790, et seq., RSMo, to levy a business license tax under subsection 2 of Section 71.800 if there are no existing license taxes levied by the governing body within the district.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

September 28, 1976

OPINION LETTER NO. 164

Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's Annual Program Plan for Adult Education Programs under the Adult Education Act of 1970, as amended.

Our review has taken into consideration the Adult Education Act of 1970, P.L. 91-230, as amended; the federal regulations applicable to such act (45 C.F.R. part 166, (October 1, 1975); 40 Fed. Reg. 17953, et seq. (April 23, 1975); and 40 Fed. Reg. 34115, et seq. (August 14, 1975)); Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a) and 2(b), Missouri Constitution; Sections 161.092, 171.096, and 178.430, RSMo 1969; and Section 171.091, RSMo Supp. 1975, and related provisions.

It is the opinion of this office that:

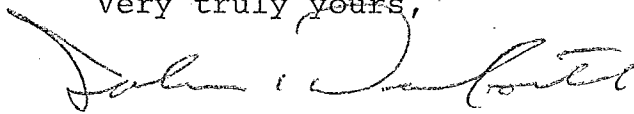
1. The Missouri State Department of Elementary and Secondary Education is the state agency primarily responsible for the state supervision of public elementary and secondary schools and is, therefore, the "State education agency" as that term is defined in 20 U.S.C. Section 1202(h).



Dr. Arthur L. Mallory

2. The Department of Elementary and Secondary Education has the authority under state law to submit this Annual Program Plan.
3. The State Treasurer has authority under state law to receive, hold and disburse federal funds under the Annual Program Plan.
4. All of the provisions of the foregoing plan are consistent with state law.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

COUNTIES: The provision in subsection 4 of Section  
COUNTY COURT: 50.540, RSMo, of the County Budget Law  
COUNTY JUDGES: which requires a unanimous vote of the  
county court to approve an unforeseen  
emergency transfer of funds from the emergency fund to another ap-  
propriation means that both judges must so vote if only two judges  
are present and that if all three judges are present, a yes vote  
by all three judges or a yes vote by two judges and silence by one  
judge constitutes a unanimous vote.

OPINION NO. 168

November 12, 1976

Mr. Jerome E. Brant  
County Counselor, Clay County  
17 East Kansas Street  
Liberty, Missouri 64068



Dear Mr. Brant:

This opinion is in response to your question asking:

"Is the 'unanimous vote' of the County Court as required by Section 50.540 R.S.Mo. for the transfers out of the emergency fund under the County Budget Law a requirement of a unanimous vote of all of the members of the County Court, or is it a requirement for a unanimous vote of those present and voting at a County Court session?"

The provision of subsection 4 of Section 50.540, RSMo, to which you refer, provides:

". . . At any time during the year the county court in counties of class one may make transfers from the emergency fund to any other appropriation, and in counties of classes two, three and four the county court may make these transfers on recommendation of the budget officer; but the transfers in all classes shall be made only for unforeseen emergencies and only on unanimous vote of the county court."

We find no definition in the Missouri statutes with respect to the words "unanimous vote" as used in subsection 4 of Section 50.540, RSMo, nor do we find any Missouri court decision in point. However, the Court of Common Pleas of Ohio in Seyler v. Balsly,

Mr. Jerome E. Brant

210 N.E.2d 747 (Ohio 1965), held that the vote of two members of the board of county commissioners in favor of rezoning was a unanimous vote of the board as required by statute where the third member was absent and not voting. In reaching this conclusion the court followed the reasoning of the Court of Appeals of Kentucky in Gumm v. City of Lexington, 56 S.W.2d 703 (Ky. 1933), in which the Kentucky court construed a Kentucky statute which provided that no change or alteration may be made in any prior adopted zoning division over the protest of property owners unless the change is adopted by the unanimous vote of the commission. The Kentucky court decided that the requirement of that section is satisfied if a quorum is present and the action taken is approved by all of the members present. Further, the Supreme Court of Errors of Connecticut in Strain v. Mims, 193 A. 754 (Conn. 1937), held that where a statute requires a unanimous vote the courts have generally held it to be sufficient if all of those members at a meeting duly called constituting a quorum vote in favor and if there is no other provision to indicate a contrary legislative intent. In the Strain case there was found to be a contrary legislative intent; and, therefore, because of the particular language used in the statute, the court held that the rule followed by the Kentucky Court of Appeals in Gumm was not applicable.

It has further been held by the Supreme Court of New Jersey in Crickenberger v. Town of Westfield, 58 A. 1097 (N.J. 1904), that where a statute requires the unanimous vote of all of the members of the council to pass an ordinance the words mean that the votes of all of the members constituting the council and not the unanimous vote of the quorum or of all the members present are required.

In Section 50.540, RSMo, there is no language indicating a legislative intent that a unanimous vote of all the members of the court is required, nor obviously is there any statutory phraseology expressly requiring a vote of all of the members. By comparison, Section 64.670, RSMo, with respect to zoning regulations in second and third class counties, requires a favorable vote of all of the members of the county court with respect to certain zoning amendments.

Therefore, we are of the view that the words "unanimous vote of the county court" as provided in subsection 4 of Section 50.540 means that all three judges must vote in favor of the transfer if all three members of the court are present and voting, but that where only two members are present the unanimous favorable vote of both of the members meets the requirements of the statute.

You ask concerning the effect of the abstention from voting of one of the members present. Where three judges are present

Mr. Jerome E. Brant

and one member remains silent, the silent member is regarded as voting with the majority, Mullins v. Eveland, 234 S.W.2d 639 (K.C.Mo.App. 1950); Bonsack & Pearce v. School Dist. of Marceline, 49 S.W.2d 1085 (K.C.Mo.App. 1932). We are of the view that this rule also applies in the situation you present and that where one member remains silent and two members vote in favor of the proposition, the silent member's vote is taken as affirmative and the requirements of a unanimous vote are met.

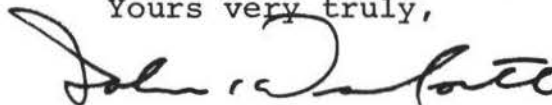
We also point out that it is our view that the Bonsack rule does not apply where the member abstains for good cause, such as where he wishes to avoid a conflict of interest. In such a case, the abstention could not be counted as a vote. And, where a unanimous vote is required, such as in the present case, only the unanimous vote of the members voting should be considered where one member abstains for good cause.

#### CONCLUSION

It is the opinion of this office that the provision in subsection 4 of Section 50.540, RSMo, of the County Budget Law, which requires a unanimous vote of the county court to approve an unforeseen emergency transfer of funds from the emergency fund to another appropriation means that both judges must so vote if only two judges are present and that if all three judges are present, a yes vote by all three judges or a yes vote by two judges and silence by one judge constitutes a unanimous vote.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

August 30, 1976

OPINION LETTER NO. 169

Honorable James C. Kirkpatrick  
Secretary of State  
State of Missouri  
Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In answer to your request dated August 20, 1976, we have prepared a ballot title for a constitutional amendment proposed by the initiative. The ballot title is:

Prohibits after January 1, 1978, sales or use  
tax on food for off premises human consumption  
or on drugs and devices prescribed for human  
medical treatment.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", is written over the typed name.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

September 7, 1976

OPINION LETTER NO. 171

Honorable James C. Kirkpatrick  
Secretary of State  
State of Missouri  
Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In answer to your request of August 27, 1976, we have prepared a ballot title for a statute proposed by the initiative.

The ballot title is:

Prohibits charges for electricity based on cost of construction in progress upon any existing or new facility or based on cost associated with owning, operating, maintaining, or financing property of an electrical corporation before operational and used for service. Any such charge being made on the effective date of this law is permitted for 90 days after the effective date of the law.

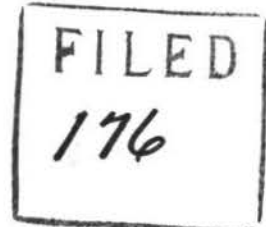
Very truly yours,

JOHN C. DANFORTH  
Attorney General

September 28, 1976

OPINION LETTER NO. 176  
Answer by Letter - Nowotny

Mr. J. Neil Nielsen  
Commissioner of Administration  
Office of Administration  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Nielsen:

This is in reply to your request for an opinion of this office asking whether you have the authority to spend monies appropriated in Section 4.395, House Bill 1004, Second Regular Session, 78th General Assembly.

Section 4.395 provides as follows:

" . . . To the Commissioner of Administration

For grants for the control of storm water in St. Louis County: for those areas in St. Louis County under the control and jurisdiction of the Metropolitan Sewer District on a matching basis with funds from the Metropolitan Sewer District, the federal government, political subdivisions of the state, or from any other source which may be available, with the state's share being no more than one-third the total cost of any project; and for those areas in St. Louis County not under the control and jurisdiction of the Metropolitan Sewer District, to be matched by funds from other sewer districts, the federal government, political subdivisions of the state,

Mr. J. Neil Nielsen

or from any other source which may be available, with the state's share being no more than one-third the total cost of any project; provided that all projects which are to utilize state funds are certified by the St. Louis County Council to the Commissioner of Administration so as to assure uniformity of effort in alleviating the problem of storm water within St. Louis County

From Revenue Sharing Trust Fund . . . . \$500,000"

We have examined Chapter 26, RSMo Supp. 1975, and provisions of the Omnibus State Reorganization Act and find no statutes giving any authority to the Commissioner of Administration to do those things listed in this appropriation, nor are we aware of any other statutes giving the Commissioner of Administration any authority in such matters. Accordingly, for the same reasons as expressed in Opinion 101, April 29, 1976, Garrett (copy enclosed), it is our opinion that the Commissioner of Administration has no legal authority to spend any of such monies appropriated in Section 4.395.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 101,  
4/29/76, Garrett



SCHOOLS:

Contracting school districts are obligated to pay the tuition fee prescribed in Section 178.510, RSMo, for those nonpublic school pupils residing within their boundaries who are over the age of 16 years and who desire to attend area vocational schools on a part-time basis.

OPINION NO. 178

November 10, 1976

Honorable James R. Strong  
State Representative, District 119  
1006 Fairmont Boulevard  
Jefferson City, Missouri 65101



Dear Representative Strong:

This official opinion is issued in response to your request for a ruling on the following question:

"The Boards of Education of school districts surrounding the Jefferson City Public School District have contracted with the Jefferson City Public School District to provide vocational educational services for high school students. Some of the students who reside in the contracting districts receive instruction in non-vocational subjects by attending a public school. Others receive such instruction by attending a nonpublic school. The question, therefore, is must the Board of Education of a contracting district pay the receiving school district the tuition fee for vocational education services, even if the student who is a resident of the contracting district also attends a nonpublic school for non-vocational education courses. The students involved are 16 years of age or older."

In Opinion No. 133 (Jasper), October 28, 1971, a copy of which is enclosed, we noted that all children between the ages of 6 and 20 years have a constitutional right to obtain a public education. The sole purpose for which school districts are organized is to discharge that constitutional mandate, and they

Honorable James R. Strong

have not only the authority but also the duty to educate all children residing within those boundaries. We concluded, therefore, that nonpublic school pupils who are over the age of 16 years are entitled, as a matter of right, to attend area vocational schools on a part-time basis. Your question is whether the school districts in which these pupils reside are obligated to pay their tuition if they choose to attend an area vocational school.

Section 178.510, RSMo 1969, provides as follows:

"The board of education of the contracting district shall pay to the receiving school district or state institution of higher learning a tuition fee which shall include the per pupil cost from teachers, incidental, building and repairs for supplying the school services, less the per pupil share of any state or federal reimbursement or other state aid paid to the receiving school on account of the attendance of the pupils from the contracting district. In case of any disagreement as to the amount of the cost of the services either or both of the contracting parties may submit the facts to the state board of education and its decision in the matter shall be final. The receiving school shall report to the sending school the attendance of all pupils covered under the contracts and the attendance of the pupils shall be credited as provided by law for the apportionment of the state school moneys by the state board of education. If the sending school district transports pupils under the contract, there shall be apportioned from the state school moneys fund a transportation reimbursement as provided for in section 163.161, RSMo."

This section requires contracting districts to pay to the receiving district the tuition fee of "pupils from the contracting district."

All the children between 16 and 20 years of age have the constitutionally guaranteed right to receive a public education on a nondiscriminatory basis. State ex rel. Gaines v. Canada, 305 U.S. 337, 83 L.Ed. 208, 59 S.Ct. 232 (1938); Brown v.

Honorable James R. Strong

Board of Education of Topeka, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954). If Section 178.510 were construed to obligate school districts to pay tuition to a public area vocational school only for those children between the ages of 16 and 20 who attend public school, and not for children of the same age who attend nonpublic school, such a construction would violate the equal protection clauses of the United States and Missouri Constitutions. Fourteenth Amendment, United States Constitution; Article I, Section 2, Missouri Constitution. We can find no rational basis, much less a compelling state interest, that would justify not paying the tuition to a public vocational school for a student between the ages of 16 and 20 solely because that student spends part of his school day at a nonpublic school.

Furthermore, to the extent that pupils attend nonpublic schools for religious reasons, such a construction might also contravene the free exercise of religion clauses of the United States and Missouri Constitutions. First Amendment, United States Constitution; Article I, Section 5, Missouri Constitution. If only public school pupils are permitted to attend public area vocational schools at public expense, then the State effectively punishes those pupils who attend nonpublic schools out of religious conviction by requiring them to pay for the free public education guaranteed all children by the Missouri Constitution. Again, we find no compelling state interest to justify such a burden on the exercise of religious freedom.

Finally, to construe Section 178.510 to require any resident school-aged pupil to pay tuition to attend a public school would violate Article IX, Section 1(a) of the Missouri Constitution, which requires the establishment and maintenance of ". . . free public schools for the gratuitous instruction of all persons in this state within the ages not in excess of 21 years . . ." Certainly, vocational education is as much a part of a public education in Missouri as the more conventional curriculum. If tuition were paid only for public school pupils, the effect would be to require nonpublic school children between 16 and 20 years of age to pay for the public education guaranteed by the Missouri Constitution.

Construing Section 178.510 to authorize school districts to pay the tuition fees to public area vocational schools for children between the ages of 16 and 20 who attend nonpublic schools does not violate the Missouri constitutional provisions providing for a separation of church and state. See Article IX, Sections 5 and 8, and Article I, Section 7, Missouri Constitution. The nonpublic school students would be attending a

Honorable James R. Strong

public area vocational school; therefore, their tuition fees would be paid by one public school district to another public school district.

CONCLUSION

It is the opinion of this office that contracting school districts are obligated to pay the tuition fee prescribed in Section 178.510, RSMo, for those nonpublic school pupils residing within their boundaries who are over the age of 16 years and who desire to attend area vocational schools on a part-time basis.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen M. Iverson.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 133  
10-28-71, Jasper

ELECTIONS:  
REGISTRATION:

Any registered voter in a county coming within the purview of Chapter 114, RSMo Supp. 1975, who changes his address prior to the closing of voter registration for a particular election, must apply to the county clerk and have his voter registration changed as provided for in Section 114.016, RSMo Supp. 1975, in order for him to vote in that election and he is not permitted to vote in the polling place where he formerly resided.

OPINION NO. 179

October 5, 1976

Mr. Theodore Johnson, III  
County Counselor, Greene County  
940 Boonville  
Springfield, Missouri 65802



Dear Mr. Johnson:

This is in response to your request for an opinion from this office as follows:

"Does Section 114.056 or Section 114.061 make provision for a registered voter whose address has changed prior to the close of registration for an election, in order for that voter to vote at the next election or at any election thereafter if the voter has not completed the proper affidavit of transfer before the close of registration?"

It is our understanding that your inquiry concerns elections held under the provisions of Chapter 114, RSMo Supp. 1975, and does not concern cities or counties having a board of election commissioners.

You state that it is common occurrence for voters who are registered and change their address within the county before the close of registration for an election to return to the polling place at which such persons are registered wishing to cast a ballot on election day. Your question is whether such persons should be permitted to vote at the polling place at which such persons are registered under these circumstances.

Registration of voters in areas without election commissions is governed by Chapter 114, RSMo.

Mr. Theodore Johnson, III

Section 114.016, RSMo Supp. 1975, provides as follows:

"1. No person shall be permitted to vote in any election unless he is duly registered and unless his name thereby appears in both the county record and the precinct record for the county and precinct in which he resides.

"2. The registration of voters shall be held as provided in sections 114.011 to 114.146. After registering, a voter is not required to register again, except as provided in sections 114.011 to 114.146. The registration of voters may be changed, canceled or transferred only as provided in sections 114.011 to 114.146."

Under the above section, no person shall be permitted to vote in any election unless he is duly registered in the county and precinct in which he resides.

Section 114.056, subsections 2 and 3, RSMo Supp. 1975, provides in part as follows:

"2. Any registered voter who changes his address within the county may transfer his registration at any time prior to the close of registration for any election by sending to the county clerk a signed application for transfer or by appearing in person at the office of the county clerk or other authorized place of registry and making application for transfer. The application for transfer shall be on forms provided by the county clerk and shall contain the following information:

Name in full \_\_\_\_\_  
Address from which registered \_\_\_\_\_  
Present address, including apartment or  
room number, if any \_\_\_\_\_  
Date \_\_\_\_\_  
Signature of voter \_\_\_\_\_

"3. Upon receipt of an application for transfer, the signature on the application shall be compared with the signature on the registration record, and if they are



Mr. Theodore Johnson, III

sufficiently alike to identify the applicant as the same person as the registered voter, transfer shall be made. Otherwise, a registered voter shall be notified that it will be necessary for him to apply personally at the office of the county clerk or other authorized place of registry for a transfer of registration. Any registered voter who cannot sign his name is required to appear in person at the office of the county clerk or other authorized place of registry to make application for transfer and to identify himself by answering identification questions such as are provided for the identification of any voter at the polls."

Under this section, any registered voter who changes his address within the county may transfer his registration anytime prior to the close of registration by making application therefor to the county clerk for a transfer of registration on forms provided by the county clerk. This section applies to any person who has changed his address prior to the close of registration for an election.

The close of registration for any election in this statute means registration books are closed at 5 p.m. on the fourth Wednesday before the election is to be held as provided for in Section 114.031, RSMo Supp. 1975.

Section 114.061, RSMo Supp. 1975, provides as follows:

"After the close of registration, for the purpose of the election immediately following the closed period, any registered voter who has changed his address within the county may present himself at the polling place for his old address and may vote after completing an affidavit of transfer which shall contain the same information as that required by the provisions of subsection 2 of section 114.056. The affidavit shall be retained with the registration books used at the election, and the county clerk shall thereafter make the appropriate changes in the registration records."

The question you have submitted is to be determined by an interpretation of these two statutes, Sections 114.056 and 114.

Mr. Theodore Johnson, III

061. The question is whether Section 114.061 applies only to a voter who has changed his address after the close of registration for that particular election or does it apply to persons previously registered who change their address prior to the close of registration for a particular election.

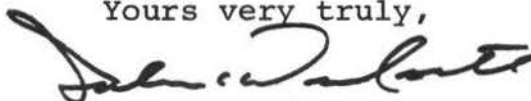
It is our view that any registered voter who changes his address prior to the close of registration for a particular election has to reregister as provided for in Section 114.056 in order for him to vote in the following election; that Section 114.061 applies only to registered voters who change their address after the close of registration for a particular election and that a voter is not entitled to vote at his old registered polling place if his address was changed prior to the close of registration for that particular election.

#### CONCLUSION

It is the opinion of this office that any registered voter in a county coming within the purview of Chapter 114, RSMo Supp. 1975, who changes his address prior to the closing of voter registration for a particular election, must apply to the county clerk and have his voter registration changed as provided for in Section 114.016, RSMo Supp. 1975, in order for him to vote in that election and he is not permitted to vote in the polling place where he formerly resided.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



ELECTIONS: No legal vacancy exists under Section 120.  
CANDIDATES: 550, RSMo, when an ineligible person files  
for and is purportedly nominated as the  
candidate for the office of county district judge and thereafter re-  
signs such purported nomination and therefore a party committee has  
no legal authority to fill such purported vacancy.

OPINION NO. 180

September 25, 1976

Honorable Samuel C. Jones  
Prosecuting Attorney  
Lawrence County  
P. O. Box 246  
Mt. Vernon, Missouri 65712



Dear Mr. Jones:

This letter is in response to your question asking:

"Where a candidate who is ineligible to hold an office is nominated at the primary election and later resigns, may the party central committee nominate a candidate for the office pursuant to § 120.550 RSMo?"

You also state:

- "a. On April 7, 1976, one Bruce Bounds filed a 'Declaration of Candidate for Nomination' accompanied by a receipt for the filing fee for the office of Western District Judge, Lawrence County.
- "b. On April 29, after the time for filing had expired, Mr. Bounds realized that he was a resident of the Eastern District rather than the Western District.
- "c. The County Clerk consulted the Secretary of State's office and was informed that the passing of the filing deadline made it impossible for Mr. Bounds to re-file in the Eastern District.

Honorable Samuel C. Jones

- "d. Mr. Bounds appeared on his party's ballot at the August primary election as the only candidate for nomination for Judge of the Western District. He received in excess of 700 votes.
- "e. On August 23, 1976, Mr. Bounds executed a 'Statement of Termination of Candidacy' (attached) before the County Clerk.
- "f. On August 26, 1976, the Lawrence County Democratic Central Committee met and selected Walter L. Bracht to replace Mr. Bounds as the nominee of the party pursuant to § 120.550, RSMo. (See attached affidavit)
- "g. On August 30, 1976, Walter L. Bracht filed a 'Declaration of Candidate for General Election' (S:C) (Attached) together with a receipt for the required filing fee."

We have not included a copy of the attached matter in this opinion.

Section 120.550, RSMo, provides:

"1. The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:

(1) When a vacancy in the candidates for nomination as a party candidate for election to any office shall occur by reason of death or resignation after the last day in which a person may file as a candidate for nomination;

(2) When any person nominated as the party candidate for any office shall die or resign before election;

(3) When a vacancy in office which is to be filled for the unexpired term at the following general election shall occur after the last day in which a person may file as a candidate for nomination.

Honorable Samuel C. Jones

"2. Nominations to fill vacancies caused by death shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the person in nomination or with the election authority not later than ten days before such election. Nominations to fill vacancies caused by resignation or withdrawal of a candidate shall be filed with the secretary of state or election authority not later than thirty days before the day fixed for the election.

"3. No name shall be allowed on the ballot until the required fee has been paid."

Under Section 120.550, a party committee has authority to nominate a replacement only if the person who filed was a lawful candidate or was lawfully nominated. In this instance, the person who filed for western district judge was ineligible to be a candidate because you have stated and, therefore, we assume that he was not a resident of the western district. See Opinion No. 26 dated January 27, 1944, to Eiser, a copy of which is enclosed. Not only was the person an ineligible candidate, but he could not be lawfully nominated at the primary election. See Mansur v. Morris, 196 S.W.2d 287, 294 (Mo.Banc 1946), in which the court held that even though people may vote for an ineligible candidate "legally they cannot nominate him."

Therefore, when the person in question resigned, he had never been a lawful candidate for the office of western district judge and he had not been lawfully nominated. It was as if no one had even filed for the office of western district judge. Section 120.550 gives the county committee no authority to replace a resigned "candidate" where there never was a lawful candidate.

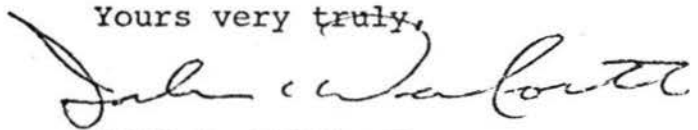
#### CONCLUSION

It is the opinion of this office that no legal vacancy exists under Section 120.550, RSMo, when an ineligible person files for and is purportedly nominated as the candidate for the office of county district judge and thereafter resigns such purported nomination and therefore a party committee has no legal authority to fill such purported vacancy.

Honorable Samuel C. Jones

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 26  
1-27-44, Eiser

STATE AUDITOR:  
APPROPRIATIONS:

Money may be disbursed from an appropriation for a subsequent fiscal year to pay for goods and services received and which constituted a legal claim in a previous fiscal year, if the subject matter of payment is otherwise within the purpose of the appropriation. A special appropriation, expressly for the purpose of satisfying the debt, is not, therefore, the only means of payment for such legal debt.

OPINION NO. 185

September 29, 1976

Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This opinion is in response to your question as follows:

"a. Is it legal to disburse money from an appropriation for a subsequent fiscal year to pay for goods and services received in a previous fiscal year, 'in the absence of a specific appropriation to that effect?'

"b. If the answer to Question No. 1 is no, is it legal for a state elected official to incur an obligation without the certification of the Commissioner of Administration pursuant to Section 33.040 (1), RSMo.?"

We assume, by your first question, that the situation involved is one wherein a legal debt of the state was not paid from an appropriation available in a particular fiscal year. You desire advice concerning whether that debt may be satisfied from an appropriation, otherwise for the same purpose, for a subsequent fiscal year.

The Supreme Court of Missouri has considered the precise issue you have raised, in your first question, in the case of State ex rel. Smearing v. Thompson, 45 S.W.2d 1078 (Mo.Banc 1932). In that case, relatrix sought payment of a pension for blind persons provided by statute. She had been removed from the rolls of eligible recipients on April 1, 1926. On January 11, 1929, she was reinstated to the roll as of September 12, 1928 (the date from which

Honorable George W. Lehr

her pension had been resumed). The Commission for the Blind subsequently reinstated her on the roll as of April 1, 1926 (the date from which she had originally been stricken off the roll). Relatrix claimed the pension amount for the period April 1, 1926, to September 12, 1928. The State Auditor, in performing his then-existing duties now performed by the Commissioner of Administration, refused payment because the current appropriation (for the period January 1, 1931, to December 31, 1932) was not available for payment of the amount due for the period April 1, 1926, to September 12, 1928. The court stated at page 1078:

"The only question here is whether the payment which relatrix seeks to have made out of the state treasury is within the 'object' to which the appropriation under the act just set out is to be applied. If it is a 'pension to the deserving blind as provided for in chapter 51, Revised Statutes, 1929,' it is. The language in the title of the Appropriation Act, 'for the biennial period beginning on the first day of January, 1931, and ending on the thirty-first day of December, 1932,' if read into the act itself, merely limits the period within which the appropriation made shall be available, in conformity with said section 19 of the Constitution; it has no reference to the time when the right to the pensions for the payment of which the appropriation is made should accrue or had accrued, nor to the period for which such pensions are payable." (Emphasis added)

This office has reached the same conclusion, based upon the Smearing case, in a comparable situation. In Opinion No. 3 to Newton Atterbury issued November 16, 1953 (copy enclosed), we considered whether contingent expenses of the General Assembly which were incurred prior to July 1, 1953, could be paid from an appropriation for the period July 1, 1953, to June 30, 1955. We concluded that payment for contingent expenses that arose during the period prior to the availability of the 1953-1955 appropriation was authorized from the 1953-1955 appropriation. We stated at pages 2-3:

"At first blush it would appear that the foregoing appropriation in House Bill 397 was for the purpose of defraying expenses incurred only during the period beginning July 1, 1953 and ending June 30,



Honorable George W. Lehr

1955. However, a careful examination of said appropriation bill will disclose that the purpose of said appropriation is to pay among other things contingent expenses of the General Assembly for the period of July 1, 1953 and ending June 30, 1955 which does not designate that said appropriation is only for the payment of such contingent expenses incurred during said period but as will be shown herein by the decision of the Supreme Court that the only question is whether said expenses come within the object to which the appropriation is to be applied. That the period specified in said appropriation merely fixes a period for which said appropriation is available."

We also observed at page 4:

". . . And we so hold notwithstanding the fact that apparently the General Assembly by its action has placed a different construction on the law for the reason that it has not been uncommon for the General Assembly to make additional appropriations for specifically paying expenses and claims where former appropriations were insufficient, as under House Bill 465 passed by the 67th General Assembly providing for another appropriation for the payment of contingent expenses of the General Assembly for a period ending June 30, 1953 which appropriation further provides that it is in addition to appropriations made for the same purpose for 1951-53. However, it is a well established rule of Statutory construction that legislative construction of a law is not conclusive as to its meaning.

"Therefore, in view of the foregoing decision, we conclude that such contingent expenses questioned herein may be paid out of the contingent fund of the General Assembly 1951-53 insofar as such fund will permit and the balance of such contingent expenses may be paid out of the contingent fund under section 8.020, House Bill 397 [the 1953-1955 appropriation]."

Honorable George W. Lehr

In Opinion No. 42 to B. H. Howard, issued July 24, 1947 (copy enclosed), we reached a similar conclusion. That opinion involved refunds of the tax on motor fuel. The appropriation for refunds for the period July 1, 1946, to June 30, 1947, was exhausted before the fiscal year was over. Approximately \$221,000 of claims were submitted during the rest of the fiscal year. Again relying on the Smearing case, supra, we held that the appropriation for the subsequent fiscal year, for the same purpose, could be utilized to pay the lawful claims that remained from the previous fiscal year.

From the foregoing, we conclude that the question is limited to whether a legal claim, for which payment is desired, is within the appropriation purpose. The period of time expressed in a particular appropriation bill title refers to the period during which the amount is available for payment and not to the period during which the right to payment must be established.

Therefore, we answer your first question in the affirmative. This opinion precludes any need to consider your second question.

#### CONCLUSION

It is the opinion of this office that money may be disbursed from an appropriation for a subsequent fiscal year to pay for goods and services received and which constituted a legal claim in a previous fiscal year, if the subject matter of payment is otherwise within the purpose of the appropriation. A special appropriation, expressly for the purpose of satisfying the debt, is not, therefore, the only means of payment for such legal debt.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 3  
11-16-53, Atterbury

Op. No. 42  
7-24-47, Howard



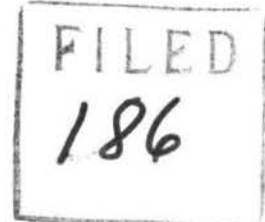
CONSTITUTIONAL LAW:  
SCHOOL TRANSPORTATION:

State funds may lawfully be distributed to public school districts in order to defray part of the cost of transporting children to and from public schools.

OPINION NO. 186

December 7, 1976

Honorable Harold Esser  
Representative, District 33  
3 West Glen Arbor Road  
Kansas City, Missouri 64114



Dear Representative Esser:

This is in response to your request for an opinion on the question of whether it is legal to expend moneys from the state school moneys fund for the transportation of pupils to and from public schools. You have not provided this office with the facts that occasion your opinion request; therefore, we can answer your request only in a most general way.

As a general proposition, the Missouri General Assembly has the power to enact any law subject only to limitations contained in the United States and Missouri Constitutions. Preisler v. Doherty, 284 S.W.2d 427 (Mo.Banc 1955); McGrew v. Granite Bituminous Paving Co., 155 S.W. 411 (Mo.Banc 1912); State ex rel. Barker v. Merchants' Exch. of St. Louis, 190 S.W. 903 (Mo. Banc 1916) aff'd 248 U.S. 365, 63 L.Ed. 300, 39 S.Ct. 114 (1919); State ex rel. Preisler v. Woodward, 105 S.W.2d 912 (Mo. 1937).

In Section 166.051, RSMo 1969, the Missouri General Assembly established the state school moneys fund to which you refer. This section provides as follows:

"All interest from the investment belonging to the state public school fund shall be paid into the state treasury and credited to the state school moneys fund, which is hereby created. All other funds for the support of free public schools shall be credited to the state school moneys fund and shall be paid out for such purposes on warrants as directed by the state board of education."

By virtue of Section 167.231, RSMo 1969, the legislature has required public school districts to furnish transportation for

Honorable Harold Esser

certain pupils who attend their schools. In addition, the legislature has authorized state financial assistance for the transportation services provided by school districts which is computed in accordance with the formula set forth in Section 163.161, RSMo 1969.

By virtue of these statutory provisions, there can be no doubt that the Missouri legislature has authorized the distribution of state funds to public school districts that provide transportation in conformance with Missouri statutes and the regulations adopted by the State Board of Education. We must next determine whether either the federal or state constitution prohibits the Missouri General Assembly from enacting statutes to require or permit the expenditure of public moneys for the purpose of providing pupil transportation to and from public schools.

Article III, Section 38(a) of the Missouri Constitution prohibits the General Assembly from granting public moneys or property to any private person, association, or corporation except in limited circumstances not pertinent to your question. This constitutional provision permits the legislature to authorize the payment of public funds only for a valid public purpose. Americans United v. Rogers, 538 S.W.2d 711 (Mo.Banc 1976). Although Missouri courts have never decided whether expenditures for pupil transportation serve a valid public purpose, the Missouri Supreme Court in McVey v. Hawkins, 258 S.W.2d 927 (Mo.Banc 1953), implicitly found that pupil transportation was an integral part of the educational system of this state. A federal court reached a similar conclusion in Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D.Mo. 1973) aff'd 419 U.S. 888 (1974). We do not believe that any legitimate question exists that expending money for public education serves a valid public purpose. Article IX, Section 1(a), Missouri Constitution. Therefore, we conclude that the expenditure of public money to provide transportation to and from public schools constitutes the expenditure of money for a public purpose and does not contravene Article III, Section 38(a) of the Missouri Constitution.

We find no other provision in either the United States or the Missouri Constitutions that would prohibit the Missouri legislature from authorizing the payment of state funds for this public purpose; i.e., providing transportation services for pupils attending public schools. The only appellate cases we have located that dealt with the constitutionality of the Missouri public school transportation statutes are Luetkemeyer v. Kaufmann, supra, and McVey v. Hawkins, supra. The only issue raised in those cases, however, was whether the transportation statutes violated the federal and state equal protection clauses by providing public transportation only for children who attend public schools and

Honorable Harold Esser

withholding such services from children who attend nonpublic schools. In both cases, the court upheld the constitutionality of the public transportation statutes. Neither opinion even remotely suggests that providing transportation to and from public schools may be prohibited under any other provision of the state or federal constitutions.

#### CONCLUSION

It is therefore the opinion of this office that state funds may lawfully be distributed to public school districts in order to defray part of the cost of transporting children to and from public schools.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen M. Iverson.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

STATE AUDITOR:  
GOVERNOR:  
ELECTIONS:  
OFFICERS:

Section 29.280 determines the manner in which a vacancy in the office of State Auditor will be filled. Pursuant to that section the Governor is required to appoint a successor to serve for the remainder of the unexpired term.

OPINION NO. 187

September 21, 1976

Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This is in response to your request for an opinion on the following question:

"If I were to resign as State Auditor prior to the November general election, in what manner would the office be filled for the remainder of my term?"

You have provided us with the following facts giving rise to your opinion request:

"I intend to resign as State Auditor. The timing of my resignation will be determined by the procedure for selecting my successor."

Article IV, Section 4 of the Missouri Constitution provides as follows:

"The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

In addition, Section 29.280, RSMo 1969, provides as follows:

"When a vacancy occurs in the office of state auditor the governor shall immediately appoint an auditor to fill such vacancy for the residue of the term in which the vacancy occurred, and until his successor is elected or appointed, commissioned and qualified."

Honorable George W. Lehr

The term of office of the State Auditor is four years. Article IV, Section 17, Missouri Constitution. Your term commenced on January 6, 1975, and does not expire until January of 1979. According to the foregoing provisions, therefore, your successor will be appointed by the Governor to serve the remainder of your term, that is, until a new auditor is elected who would begin serving in January of 1979.

Our legal research on your question has disclosed a Missouri statute with more general language than Section 29.280, which explicitly concerns the office of State Auditor. Section 105.030, RSMo 1969, provides as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, occurs or exists in any state or county office originally filled by election of the people, other than in the offices of lieutenant governor, state senator or representative, or sheriff, the vacancy shall be filled by appointment by the governor; and the person appointed after duly qualifying and entering upon the discharge of his duties under the appointment shall continue in office until the first Monday in January next following the first ensuing general election, at which general election a person shall be elected to fill the unexpired portion of the term, or for the ensuing regular term, as the case may be, and the person so elected shall enter upon the discharge of the duties of the office the first Monday in January next following his election, except that when the term to be filled begins on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold the office until such other date. This section shall not apply to vacancies in county offices in any county which has adopted a charter for its own government under section 18, article VI of the constitution."

Although this provision might appear to apply to all state and county elective offices other than those specifically exempted, it does not, for two sections later in Section 105.050 the General Assembly established a different procedure for filling vacancies in the offices of Attorney General and Prosecuting or Circuit Attorneys. The General Assembly also has established different procedures for filling vacancies in the offices of Secretary of State (Section 28.190, RSMo 1969), State Treasurer (Section 30.070, RSMo 1969), and State Auditor, as previously noted. Each of these provisions concerns the offices of state or county elected officials who, unlike the

Lieutenant Governor, legislators and sheriffs, are not specifically exempted from the provisions of Section 105.030. It therefore appears that Section 105.030 applies only when the legislature has not otherwise prescribed specific procedures for filling vacancies in specific state and county offices.

The case of State ex inf. Barrett ex rel. Oakley v. Schweitzer, 258 S.W. 435 (Mo. Banc 1924), supports this conclusion. There the court had to determine when the term of an appointee for Prosecuting Attorney expired, which required construction of several statutes, including the predecessor of Section 105.030. In construing that statute the court acknowledged its comprehensive language. Despite that language, however, the court stated that Section 105.030 applies to vacancies in state and county offices "(u)nless a clear contrary provision has otherwise been made by the Legislature . . ." Id. at p. 439. Section 29.280 constitutes a "clear contrary provision (which) has otherwise been made by the Legislature"; therefore, Section 29.280, not Section 105.030, determines the manner in which a vacancy in the office of State Auditor is filled,

This conclusion finds ample support in well-established rules of statutory construction. It is axiomatic that when one statute deals with a subject in general and comprehensive terms while another deals with a part of the same subject in a more minute and definite way, the two should be read together and harmonized. To the extent of any repugnancy between them, the specific statute will prevail over the general. State ex rel. City of Springfield v. Smith, 125 S.W.2d 883, 885 (Mo. En Banc 1939); State v. Harris, 87 S.W.2d 1026, 1029 (Mo. 1935); State v. Mangiaracina, 125 S.W.2d 58, 60 (Mo. 1939).

In the case of State v. Harris, supra, the Supreme Court, quoting from State ex rel. County of Buchanan v. Fulks, 247 S.W. 129 said:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication." Id. at p. 1029.



Honorable George W. Lehr

Section 105.030 is general in terms while Section 29.280 deals exclusively with the office of State Auditor. Therefore, Section 29.280 prevails over the provisions found in Section 105.030 because it is specific and deals with the subject of filling vacancies in a "more minute and definite way."

In State ex inf. Major v. Amick, 152 S.W. 591 (Mo. 1912), the Missouri Supreme Court addressed the same question posed by your inquiry, namely, whether a specific or a general statute determined the manner in which a vacancy should be filled. The court held that the specific statute prevailed over the general provisions found in what is now Section 105.030 discussed above. The facts in that case were as follows.

At the November, 1908, general election, Lucien Eastin was elected circuit judge for a six-year term. Approximately two years later he resigned his office, and the Governor appointed W. C. Amick to fill the vacancy. The appointment was made pursuant to Section 3896, RSMo 1909, which provided for an appointment ". . . until the next general election after such vacancy occurs, when the same shall be filled by election for the residue of the unexpired term." Amick and a Charles H. Mayer were candidates for that judgeship in the general election of November, 1912. Mayer received a majority of votes, and he was commissioned by the Governor and took the oath of office on November 30, 1912.

Amick, the appointee-incumbent, contended that the election was a nullity and insisted that he was entitled to remain in office until January of 1915 when the six-year term would expire. The Attorney General, at the relation of Mayer, filed an ouster suit in the Missouri Supreme Court challenging Amick's authority to remain in office. Two issues were presented: 1) whether the election required by statute was the next general election (November, 1912) or the next general election when that circuit judgeship would normally be on the ballot (November, 1914); and 2) if the statute required an election in November of 1912, did Amick's term as appointee expire immediately after the election or in January of the following year?

The court held that the statute required an election in November of 1912. As to the date when the appointee's term expired, the Attorney General argued that Section 3896 authorized the appointee to serve only until the election. Amick contended that his appointment did not expire until January following the election, because Section 5828 (now Section 105.030) applied and provided that the appointee ". . . continue in office until the first Monday in January next following the first ensuing election." The question before the court, therefore, was whether the specific provisions of Section 3896 or the general provisions of Section 5828 prescribed the length of an appointee's term.

Honorable George W. Lehr

The court held that the specific statute governed and constituted an exception to the general provisions of Section 105.030. In reaching this conclusion, the court acknowledged its duty to read both statutes together and to harmonize them so that both could be given full effect. To illustrate this principle, the court in its opinion combined the two statutes by setting forth Section 105.030 and adding to it the specific provision of Section 3896 introduced by the words "Provided that . . . ." By doing this, the court observed, all seeming conflicts were harmonized. The court then held as follows:

"It is perfectly clear from reading the two sections that the provisions of section 3896 apply specially to vacancies in the office of judge of courts of record and the manner of filling them, and that those of section 5828 are general in its provisions and are sufficiently broad, if standing alone, to embrace vacancies in the office of the judge of courts of records; and, if the former is not to be construed to be an exception to the latter, then there would be a clear conflict between them; but, since both sections were enacted at the same time and stand in *pari materia*, we must interpret them together, according to the rule before mentioned, and when so done the legislative intent is clear, and we must hold that section 3896 is an additional exception to those stated in section 5828." *Id.* at p. 597. (Emphasis added).

Applying the reasoning of the court in *Amick* to the present situation, the only construction that harmonizes and gives effect to both Section 105.030 and Section 29.280 is that the latter constitutes an "additional exception" to the former. A holding that the general language of Section 105.030 governs the present situation would render meaningless the statute specifically enacted by the General Assembly to prescribe the manner in which a vacancy in the office of State Auditor is to be filled. Although Section 105.030 and Section 29.280 in their present form were not enacted at the same time, nonetheless they are in *pari materia* for they concern the same subject, i.e., the manner in which vacancies in state offices are to be filled. Accordingly they are to be "' construed together as though they constituted one act.'" *Amick, supra*, at p. 596, citing *State ex rel. Wagner v. Patterson*, 105 S.W. 1052 (Mo. 1907). See also *State v. Harris, supra*.

We conclude that your question is resolved by application of the rule that specific statutes prevail over general statutes concerning the same subject. There-



Honorable George W. Lehr

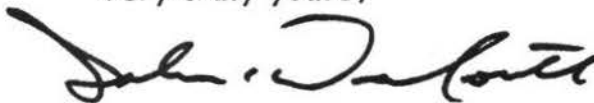
fore, Section 29.280 establishes the procedure for filling a vacancy in the office of State Auditor.<sup>1</sup> That section requires the Governor to appoint a successor for the remainder of your term when a vacancy occurs by reason of your resignation.

#### CONCLUSION

Based on the foregoing authorities, it is the opinion of this office that Section 29.280 determines the manner in which a vacancy in the office of State Auditor will be filled. Pursuant to that section the Governor is required to appoint a successor to serve for the remainder of the unexpired term.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen M. Iverson.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

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<sup>1</sup> We are aware of the fact that in November of 1960 an election was conducted to fill a vacancy in the office of United States Senator created by the death of the Honorable Thomas C. Hennings, Jr. An election in that situation was specifically required by Section 105.040, RSMo, and the Seventeenth Amendment to the United States Constitution. Both of these provisions apply exclusively to the office of United States Senator; accordingly, they have no bearing on your question.

October 5, 1976

OPINION LETTER NO. 188  
Answer by Letter - Klaffenbach

Honorable R. L. Usher  
State Representative, 12th District  
600 Sunset Drive  
Macon, Missouri 63552



Dear Mr. Usher:

This letter is in response to your opinion request in which you ask whether policemen, the city clerk and the department foreman of a third class city are required to be residents of the city.

We enclose our Opinions No. 514, dated November 25, 1969, to Belt; No. 516, dated December 23, 1969, to Jackson; and No. 62, dated January 5, 1973, to Bild, which are self-explanatory and which answer your questions respecting policemen and the city clerk.

Insofar as your question concerning departmental foremen is concerned, we are uncertain as to what duties the ordinances have placed upon these employees. However, if their duties are only ministerial they would be within the exemption to the residency requirements imposed by Section 77.380, RSMo.

As we indicated in our enclosed Opinion No. 514 - 1969, Section 77.380, does not prohibit the municipality from imposing residency requirements upon those officers or employees who are exempt from the statutory residency requirements.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosures



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

November 15, 1976

OPINION LETTER NO. 189

Honorable Donald L. Manford  
State Senator, 8th District  
Room 334, State Capitol  
Jefferson City, Missouri 65101

Dear Senator Manford:

This letter opinion is in answer to your recent opinion request which reads as follows:

"Is stop payment action on a check for products or services a crime under Missouri law?"

In answer to paragraph No. 4 of the opinion request form calling for a complete statement of all the facts giving rise to the question, you state:

"Attorney renders service for a client. Client executes check for services. Client then leaves town. Client stops payment on check at Bank.

"Is this a crime under Missouri Law?"

We have examined the statutes of Missouri and find no provision making stop payment of a check a crime under the factual situation set out under paragraph No. 4 of the opinion request form.

This opinion letter is based upon the precise and exact facts set out in the opinion request and does not purport to rule on any other factual situation.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

*School*



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

November 30, 1976

OPINION LETTER NO. 190

Honorable George Dames  
Representative, District 50  
8 Boxwood Drive  
O'Fallon, Missouri 63366

Dear Representative Dames:

This is in response to your request for an opinion on the following question:

"Can a school district in Missouri limit its teachers from purchasing tax sheltered annuities from any properly licensed insurance company and allow the teachers to purchase same from only two or three insurance companies approved by the district?"

"Does this outlined procedure violate the insurance companies or insurance agents rights of free trade or commerce?"

We believe your question is answered by Opinion Letter No. 23 issued April 2, 1974, to Twitty. We have enclosed a copy of that opinion letter, together with Opinion No. 275 and the advisory guidelines referred to in that opinion.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

Enclosures

A large, stylized handwritten signature or set of initials, possibly "FVB" or "GVS", with a long, sweeping flourish extending to the right.



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

October 18, 1976

OPINION LETTER NO. 191

Honorable Larry Mead  
Representative, District 111  
1815 Highridge Drive  
Columbia, Missouri 65201

Dear Representative Mead:

This letter is in response to your request for an opinion asking as follows:

"Are Collectors of Revenue in second class counties authorized to retain a commission, which would be part of their overall salary, for the collection of taxes from a levee or drainage district? Can they retain commissions on back and delinquent tax collections in addition to their set salary?"

You further state:

"Section 52.420 RSMo 1969, Sup 1975, which was enacted in 1969 states that: 'The salary shall be in lieu of all fees, commissions, penalties, charges and other compensation now charged, received or allowed by virtue of any statute, to any such collector as compensation for his services except the compensation provided by subsection 3 of this section.'

"Section 52.270(3) RSMo 1969, Sup 1975, which was enacted in 1973, states that: 'The limitation on the amount to be retained as herein provided applies to fees and commissions on

current taxes, but does not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes nor to fees provided by section 52.250.'

"Since sections 52.260 and 52.270 seem to apply to second class county collector's to some degree and since section 52.420, establishing a set salary was passed earlier (1969) whereas sections 52.260 and 52.270 were passed in 1973 the question arises as to whether or not second class county collectors are entitled to any of the commissions listed in section 52.270(3)?"

Section 52.420, RSMo Supp. 1975, provides:

"1. The county collector in all counties of the second class shall receive, as compensation for his services, an annual salary of thirteen thousand five hundred dollars.

"2. The salary shall be in lieu of all fees, commissions, penalties, charges and other compensation now charged, received or allowed by virtue of any statute, to any such collector as compensation for his services except the compensation provided by subsection 3 of this section.

"3. In all counties of the second class in which the county collector has entered into a contract with a constitutional charter city providing for the collection of municipal taxes by the collector, the collector shall be paid as compensation for the additional duties an annual salary of three thousand dollars, during the period in which the contract is effective, payable out of the county treasury."

Subparagraph 3 of Section 52.270, RSMo Supp. 1975, provides:

"The limitation on the amount to be retained as herein provided applies to fees and commissions on current taxes, but does not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes nor to fees provided by section 52.250."

Honorable Larry Mead

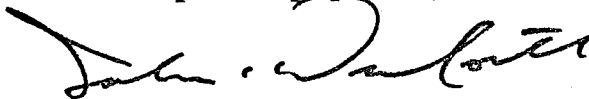
It should be noted, however, that Section 52.270 refers to limitations on fees and commissions of collectors and the classifications indicated in subdivision (1) to (14) of Section 52.260, RSMo Supp. 1975. Section 52.260, however, pertains to only those collectors specified in the first paragraph of that section, to wit:

"The collector in counties not having township organization, except in counties of the first class not having a charter form of government, shall collect and retain the following commissions for collecting all state, county, bridge, road, school and all other local taxes, including merchants', manufacturers' and liquor and beer licenses, other than back, delinquent and ditch and levee taxes, and the commissions constitute his compensation except in counties where the collector is paid a salary in lieu of fees:"  
(Emphasis added)

We also note that subsection 3 of Section 52.270, which you note and which we have quoted, was also contained in the Missouri laws at the time of the enactment of Section 52.420, also quoted above, which provided for an annual salary for collectors in counties of the second class. We therefore conclude in answer to your first question that collectors in second class counties are not authorized to retain a commission in addition to their salary for the collection of back and delinquent taxes and ditch and levee taxes.

We also understand that you have a copy of our Opinion No. 67, dated May 5, 1955, to Norton, in which we held that the collector of revenue in a county of the second class is entitled to receive for his services a salary provided in Section 52.420, RSMo Supp. 1953, and that he may not receive further or additional compensation arising from the collection of drainage or levee district taxes. You question the validity of that opinion. While, as you noted, there have been changes in the statutes which were quoted in that opinion, it is our view that the conclusion is still correct and the reasoning of that opinion which draws a distinction between the sections you have cited, Sections 52.420, 52.260 and 52.270 is still valid.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

MOTOR VEHICLES: 1. The Director of Public Safety has  
DEPARTMENT OF PUBLIC SAFETY: the authority to approve or disapprove  
the use of the Deceleration Alert System on motor vehicles in this state pursuant to the provisions of Section 307.030, RSMo 1969. 2. The use of the Deceleration Alert System on motor vehicles operated within this state would not violate any laws of the state of Missouri.

OPINION NO. 195

November 23, 1976

Mr. Michael D. Garrett, Director  
Department of Public Safety  
P. O. Box 749  
Jefferson City, Missouri 65101



Dear Mr. Garrett:

This is in reply to your request for an opinion of this office on the following questions:

- "a. Are there any laws in this State which will prohibit the operation of a vehicle which is equipped with a Deceleration Alert System?
- "b. Does the Department of Public Safety have authority under Section 304.019 or under Section 307.030 (transferred to the Department of Public Safety through governmental reorganization) to issue an approval for the Deceleration Alert System?"

As background to the above inquiries, you have informed us that the Deceleration Alert System is a device mounted on the rear of a motor vehicle which shows a green light when the operator's foot is on the accelerator, but when the operator's foot is removed from the accelerator two amber lights show to the rear of the vehicle. In addition, when the brake pedal of the vehicle is depressed, the two amber lights go out and the vehicle's existing brake lights come on.

Section 307.030, RSMo 1969, provides as follows:

- "1. The director of revenue is hereby given authority to pass upon the lighting



Mr. Michael D. Garrett

equipment of any vehicle, motor vehicle, or motor-drawn vehicle with a view to its safety for use on a street or highway.

"2. The director of revenue is hereby authorized to promulgate rules and regulations not inconsistent with this chapter, and publish same.

"3. The director of revenue may require the approval of any lighting equipment or lighting device, and charge a fee therefor of fifty dollars for each device or each single lighting device submitted for approval, and may set up the procedure which may be followed when any lighting equipment or lighting device is submitted for approval.

"4. The director of revenue may revoke or suspend for cause, after hearing, any certificate of approval that may be issued covering any lighting equipment or lighting device under this chapter."

Of course, Section 11, subsection 9 of the Omnibus State Reorganization Act of 1974, Senate Bill No. 1, First Extraordinary Session, 77th General Assembly, transferred the above powers, functions, and duties to the Director of Public Safety.

Based upon your description of the Deceleration Alert System, it is our opinion that the System is covered by the provisions of Section 307.030. We believe that the terms "lighting equipment" and "lighting device" as used in the statute encompass the Deceleration Alert System. State ex rel. Zoological Park Subdistrict of City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975); Playboy Club, Inc. v. Myers, 431 S.W.2d 228 (Mo. 1968). Furthermore, we do not believe that the provisions of Section 304.019, RSMo 1969, apply to the Deceleration Alert System. The language of Section 304.019 applies to devices designed to signal the turning, stopping, or sudden decrease in speed of a motor vehicle. It would appear from your description of the Deceleration Alert System that its purpose is to merely indicate when a driver takes his foot off the accelerator, and not to signal the stopping, turning, or sudden decrease in speed of the vehicle. Therefore, we conclude that the Deceleration Alert System falls within the purview of Section 307.030, RSMo 1969, and that the Director of Public Safety has the authority to approve such a system.

Mr. Michael D. Garrett

This office has also examined the laws of the state of Missouri to determine whether or not any law would prohibit the operation of a motor vehicle which is equipped with the Deceleration Alert System, as described in your opinion request, within this state. The laws of the state of Missouri relevant to lighting and signaling devices of motor vehicles are contained in Section 304.019, RSMo 1969, and Chapter 307, RSMo 1969. We have been unable to locate any state law which would prohibit the use of the Deceleration Alert System on motor vehicles operated within this state.

#### CONCLUSION

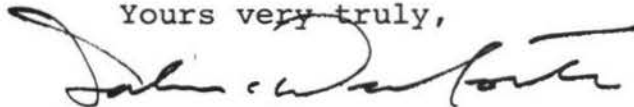
It is, therefore, the opinion of this office that:

1. The Director of Public Safety has the authority to approve or disapprove the use of the Deceleration Alert System on motor vehicles in this state pursuant to the provisions of Section 307.030, RSMo 1969.

2. The use of the Deceleration Alert System on motor vehicles operated within this state would not violate any laws of the state of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, William F. Arnet.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

October 13, 1976

OPINION LETTER NO. 198  
Answer by Letter - Klaffenbach

Honorable W. E. Lewis  
State Representative  
300 Boyd Street  
DeSoto, Missouri 63020



Dear Mr. Lewis:

This letter is in response to your question asking whether a circuit juvenile officer who has his or her salary paid partially by the state and partially by the county or counties in the circuit is covered by the Tort Defense Fund.

The Tort Defense Fund is found in Section 105.710, RSMo Supp. 1975, and covers certain designated state officers and employees. Juvenile court personnel are not specified as being within the coverage of such section.

Our answer to your question is, therefore, that juvenile court personnel are not covered by the Tort Defense Fund, Section 105.710, RSMo Supp. 1975.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

October 13, 1976

OPINION LETTER NO. 199

Mr. Alan C. Kohn, Chairman  
Missouri Housing Development Commission  
20 West 9th Street, Suite 934  
Kansas City, Missouri 64105

Dear Mr. Kohn:

This letter is in response to your question asking:

"Can a public housing authority (PHA) organized pursuant to the Housing Authorities Law of Missouri (Sections 99.010 through 99.230 RSMo 1969) enter into a Management Contract with the owners of a private apartment project developed pursuant to Section 8 of the Housing & Community Development Act of 1974 (P.L. 93-383 and 42 U.S.C. 3531 et seq.) and financed by the Missouri Housing Development Commission in accordance with the State Housing Law (Chapter 215 RSMo as amended 1974), pursuant to which Management Contract the PHA will manage the project and administer tenant screening, selection and income re-certification for a fee which covers direct costs incurred plus allowances for administrative expenses and overhead in performing these services, not to exceed a maximum fee approved by the Department of Housing and Urban Development and Missouri Housing Development Commission and not allowing for a profit to the PHA?"

You have furnished us with other information and argument in support of the contention that a Public Housing Authority

Mr. Alan C. Kohn

organized under such sections should be allowed to enter into such a management contract.

As you have noted, we concluded in our Opinion No. 176, dated May 10, 1974, to Drake, that it was our view that a Housing Authority of a city may not enter into a contract with the owners of an apartment complex located in the same city by the terms of which the Housing Authority is to manage and operate for a fee the apartment complex for the owners pursuant to standards established by the owners.

Presumably that opinion would differ possibly in only three respects from the question that you ask. That is, the present question does not concern the payment of a fee but merely the reimbursement of costs of the Housing Authority. The type of unit to be managed in the present circumstance is a private apartment project developed pursuant to, as you indicate, Section 8 of the Housing and Community Development Act of 1974 (P.L. 93-383 and 42 U.S.C. 3531 et seq.). Also, a possible difference between that opinion and the instant question is the amount of control that the Housing Authority would have with respect to the operation and management of the complex.

In our view the conclusion we reached in our Opinion 176-1974, would still be applicable in the premises. The Housing Authority would not have any authority to operate such a complex on a cost reimbursement basis even though the Authority retains more control.

Some contention has been made that the emphasis on the powers of the Housing Authority under Section 99.080 should be placed upon the power of the Authority to lease and operate housing projects and to rent any dwellings and to make and execute necessary contracts.

If there is any ambiguity in the powers of the Housing Authority under Section 99.080 it seems to be sufficiently clarified by Section 99.090 which provides that it is declared to be the policy of this state that each Housing Authority "shall manage and operate its housing projects in an efficient manner." However, even in the absence of such an expression which emphasizes that the powers of the Housing Authority refers to "its" housing projects it would be our view that the powers given the Housing Authority under Section 99.080 with respect to leases and operations are limited to the Housing Authority's own leases and operations except as may be otherwise expressly provided. We find no express provision authorizing the Housing Authority

Mr. Alan C. Kohn

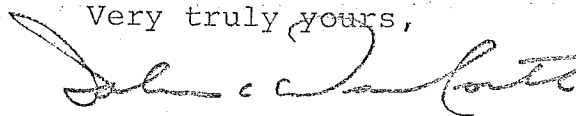
to operate a private complex such as you indicate. In this respect the law has not been amended to allow for such a change since the issuance of our opinion in 1974.

We noted in our opinion of 1974, that the powers of the Housing Authority are limited as are the powers of all municipal corporations to such powers as are necessarily or fairly implied or incident to the powers expressly granted and to those essential to the declared objectives and purposes of the corporation.

The limitation upon the powers of the Housing Authority is further indicated by reference to subsection 1.(2) of Section 99.080, RSMo, which limits its powers to lease and operate housing projects to the area of operation of the Housing Authority. Subsection 2 additionally limits the Housing Authority's powers in that it expressly provides that no provision of law with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to the Authority unless the legislature shall specifically so state.

In the premises we conclude therefore that the view we stated in our opinion of 1974 is applicable and the Housing Authority does not have the power to enter into such an agreement.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

LIBRARIES:  
CITY LIBRARIES:

In cases where the boundaries of a municipal library district do not encompass the entire city in which it is located, the trustees of the municipal library district must be residents of such district.

OPINION NO. 200

December 21, 1976

Mr. Charles O'Halloran, Interim Commissioner  
Coordinating Board for Higher Education  
600 Clark Avenue  
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This opinion is in response to your request for the opinion of this office on the question of whether a library trustee of a municipal library district must be a resident of the library district when the boundaries of the district are not coextensive with the boundaries of the city.

The boundaries of a municipal library district do not encompass the entire city in which it is located in situations where a city containing a municipal library district has annexed land after October 13, 1965, which at the time of annexation was part of a county library district. In such cases the residents of the city located in the territory of the county library district are not taxed for the municipal library district and have no vote with respect to matters affecting the municipal library district. Sections 182.480 and 182.490, RSMo 1969. Section 182.490 further provides that any reference in Sections 182.010 to 182.460 to the qualified electors, citizens or inhabitants of a city shall mean any qualified electors, citizens, or inhabitants of the municipal library district. In Opinion Letter No. 52, July 12, 1974, this office held that the provision of Section 182.170, RSMo, requiring the trustees of a municipal library district shall be "chosen from the citizens at large" meant that the trustees had to be residents of the city. In view of Section 182.490, RSMo 1969, they must also be residents of the district in the event the boundaries of the city and the boundaries of the district are not the same.

#### CONCLUSION

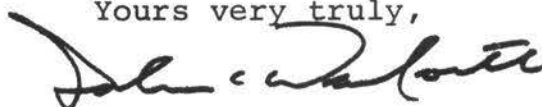
It is the opinion of this office that in cases where the boundaries of a municipal library district do not encompass the

Mr. Charles O'Halloran

entire city in which it is located, the trustees of the municipal library district must be residents of such district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

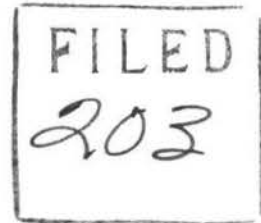
Enclosure: Op.Ltr.No. 52  
7-12-74, O'Halloran



October 19, 1976

OPINION LETTER NO. 203  
Answer by letter-Mansur

Honorable Emory Melton  
State Senator, District 29  
201 West 9th Street  
Cassville, Missouri 65625



Dear Senator Melton:

This is in response to your request for an opinion from this office as follows:

"Can an elected county highway commissioner receive a salary or wages for services rendered acting in a supervisory capacity in regard to road maintenance, construction, and supervision of employees over and above the amount provided for in Section 230.220, sub-section 3?

"Stone County, Missouri, which is in my senatorial district adopted the alternative form of the highway commission by a vote of the people. The jurisdiction of all the county roads runs with the 5-member commission which consists of the three members of the county court and the commissioner from the northern district and the commissioner from the southern district of Stone County, both of whom are elected. The question now arises as to whether either one of the commissioners can receive compensation over and above that provided as set forth in #3 herein which would compensate him for going out on the job and acting in a supervisory capacity on that job."

Honorable Emory Melton

Stone County to which you refer is a third class county. The county highway commission to which you refer is governed by Sections 230.200 to 230.260, RSMo Supp. 1975. They provide for a county highway commission composed of three county judges and two persons elected from the unincorporated area of the county court districts established by the county court.

Section 230.220, RSMo, to which you refer, provides in part as follows:

"3. Members of the county highway commission shall receive as compensation for their services fifteen dollars per day for the first meeting each month and five dollars for each meeting thereafter during the month. The members shall also receive a mileage allowance of eight cents per mile actually and necessarily traveled in the performance of their duties."

Under the above statute, members of the highway commission receive for their compensation fifteen dollars a day for the first meeting each month and five dollars for each meeting thereafter during the month and mileage allowance of eight cents per mile actually and necessarily traveled in performance of their duties.

Section 230.230, RSMo Supp., provides as follows:

"In all counties adopting sections 230.200 to 230.260, all powers and duties heretofore exercised by the county court, township boards, and special road district commissioners relating to the improvement, construction, reconstruction, restoration and maintenance of roads shall be exercised by the county highway commission."

Section 230.240 provides as follows:

"1. In addition to the comprehensive road plan required by section 230.235, all counties of the third class adopting sections 230.200 to 230.260 shall employ a qualified graduate civil engineer as county highway engineer; except that, any person serving as county highway engineer on the date the county for which he serves adopts the provisions of sections 230.200 to 230.260 may

Honorable Emory Melton

be retained as county highway engineer and shall be considered qualified for that position within the meaning of sections 230.200 to 230.260. The county highway commission shall appoint the county highway engineer and shall set his salary to be paid out of the road and bridge fund of the county. The services of the engineer shall be available in an advisory capacity to any any [sic] incorporated municipality within the county at no charge to the municipality.

"2. The county highway engineer shall have general supervision over the construction, maintenance, repair and reconstruction of all public highways, roads, bridges and culverts, subject to the approval of the county highway commission."

You inquire whether any one of the commissioners can receive compensation over and above that provided for in Section 230.220.3 to compensate him for going out on the job and acting in a supervisory capacity of that job. All five members of this commission, including the two elected from the districts, are public officials; and the question is whether they are entitled to receive any compensation in addition to that allowed by statute for their services.

In Nodaway County v. Kidder, 129 S.W.2d 857 (Mo. 1939), a member of the County Court of Nodaway County was allowed compensation by the county court in addition to his salary for services of inspecting the roads and culverts and taking various trips to other towns in the county to purchase supplies of various kinds. This was a suit to recover all compensation paid him by the county in excess of the amount allowed by statute as compensation for a county judge. In holding that Nodaway County was entitled to recover extra compensation, the Supreme Court of Missouri stated, l.c. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too

Honorable Emory Melton

must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo.App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo.App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645.

"The duties performed by appellant, and for which the additional fee or salary and mileage was paid, were with reference to matters pertaining to and relating to his official duties as presiding judge of the county court and said services were within the scope of said official duties. The work in which appellant was engaged was directly under the supervision of the county court. Public policy requires that a public officer be denied additional compensation for performing official duties."

It is our view that under the statute it is the duty of the members of the county highway commission under provisions of Section 230.200 to and including Section 230.260 to supervise road construction and maintenance as part of their official duties and that they are not entitled to any compensation in addition to that allowed by statute for any additional services rendered.

In Nodaway County v. Kidder, supra, the court further stated, l.c. 861:

"Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy.

Honorable Emory Melton

Town of Carolina Beach v. Mintz, 212 N.C.  
578, 194 S.E. 309; 46 C.J. 1037 Sec. 308."

It is our opinion that any contract of employment by the county highway commission or any of its members to render service as an employee for the commission is against public policy and void as was stated in Nodaway County v. Kidder.

Yours very truly,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

December 1, 1976

OPINION LETTER NO. 208

Honorable Hal E. Hunter, Jr.  
Prosecuting Attorney  
New Madrid County  
545 Virginia Avenue  
New Madrid, Missouri 63869

Dear Mr. Hunter:

This letter is in response to your opinion request asking as follows:

"Our question is can the Sheriff of New Madrid County charge the City of St. Louis an amount above the actual cost of board for their prisoners and if he can, who is to retain the amount above the cost of board, the New Madrid County Sheriff personally or the County Revenue Fund of New Madrid County."

You further state:

"The New Madrid County Sheriff is currently keeping City of St. Louis prisoners in the New Madrid County Jail. He has never charged the County of New Madrid for board of these prisoners, presumably paying the expense himself. The City of St. Louis is reimbursing our sheriff \$10.00 per day per prisoner for their keep in the county jail and the Sheriff is retaining all of this amount, turning nothing over to the county. The Sheriff is currently charging New Madrid County \$2.00 per day per prisoner for board of our prisoners and change of venue prisoners from other counties. If the same cost of board would apply to the City of St.

Honorable Hal E. Hunter, Jr.

Louis prisoners, (we assume it would as it would seem unlikely for him to prepare two sets of meals) as he is presently charging for New Madrid County prisoners, it appears the Sheriff is realizing an \$8.00 per day per prisoner profit from the keeping of St. Louis City prisoners."

New Madrid County is a third class county.

We asked you for further clarification, and you informed us that it is your understanding that prisoners received from the sheriff of the City of St. Louis are not recorded by the New Madrid County sheriff's office on his report to the county on the prisoners in jail and that he limits his report to New Madrid County to offenders awaiting trial in New Madrid County. You further state that it is your understanding that if the sheriff's costs are actually two dollars per day he is clearing a net profit of eight dollars per day per prisoner by the use of county facilities and county employees. You also indicate that you are not aware of the nature of the actual arrangements between the New Madrid County sheriff and the City of St. Louis or between the New Madrid County sheriff and the sheriff of the City of St. Louis, but that you understand the sheriff of New Madrid County receives his check directly from the comptroller of the City of St. Louis.

Unfortunately, we have not received requested information from either the city counselor's office of the City of St. Louis or the office of sheriff of the City of St. Louis with respect to this matter. We are unaware of what, if any, effect the federal court decision with respect to the St. Louis City jail conditions may have concerning this situation. Therefore, our answer must be qualified to the extent that there are obviously items of information which may be of value to us that have not been furnished to us. Since, however, you request an expedited response to your question, we have undertaken to attempt to reply on the basis of the information we have.

We do not in any way attempt to pass on the validity of any arrangement, if any, between St. Louis City and New Madrid County or the propriety of St. Louis City's paying the sheriff of New Madrid County or as to the amount of money that can or should be legally paid by St. Louis City to New Madrid County or to the sheriff of New Madrid County.

Prior to the enactment of House Bill No. 1130, Second Regular Session, 78th General Assembly, this office held that the expenses of a sheriff or a jailkeeper of another county of the third

Honorable Hal E. Hunter, Jr.

or fourth class for the boarding of prisoners from a different county pursuant to Section 221.230, RSMo, may not be arbitrary and must be in conformance with the express provisions of Section 221.090 which provided that the sheriff of a third class county shall furnish a statement to the county court supported by his affidavit of the actual cost incurred by him in the boarding of prisoners, the names of the prisoners, and the number of days each spent in jail and also that the county court was to audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary costs. That section also provided for the inclusion of the chargeable board costs in the court costs bill to be charged as provided by law. We enclose our Opinion No. 203 dated May 13, 1965, to Fritz, with respect to the keeping of such prisoners prior to the enactment of House Bill No. 1130.

House Bill No. 1130 repealed Section 221.090, RSMo Supp. 1975 (which was similar to Section 221.090, RSMo 1969), and other related sections and provides in pertinent part as follows:

"Section 2. 1. The governing body of any county and of any city not within a county shall fix the amount to be expended for the cost of incarceration of prisoners confined in jails or medium security institutions. The per diem cost of incarceration of these prisoners chargeable by the law to the state, shall be determined, subject to the review and approval of the office of administration.

"2. The actual costs chargeable to the state shall be seventy-five percent of the allowable per diem cost or eight dollars per day per person, whichever is less."

This office issued its Opinion No. 166 dated August 31, 1976, to Nielsen, with respect to the taxation of such costs under House Bill No. 1130. We are not here concerned with the taxation of such costs; however, that opinion is enclosed for your information.

It thus appears that prior to the enactment of House Bill No. 1130, the actual costs incurred by the sheriff of a third class county for the board of prisoners were payable to the sheriff and since the enactment of House Bill No. 1130, the governing body of the county, in this case New Madrid County, is to fix the costs of board.



Honorable Hal E. Hunter, Jr.

In any event, it appears from the information that you have furnished us that the sheriff is utilizing facilities of the county for his own profit and that he is not entitled to retain the excess. The excess itself would be determined by applying either Section 221.090 until the date of its repeal or House Bill No. 1130 which became effective August 13, 1976. Therefore, as we see it, the excess is to be determined under the provisions of Section 221.090 for the period involved prior to the repeal of that section which bases the amount to be paid to the sheriff on the actual and necessary expense of the board of prisoners, and thereafter under House Bill No. 1130 based on the amount determined by the county court to be spent for the cost of board for such prisoners.

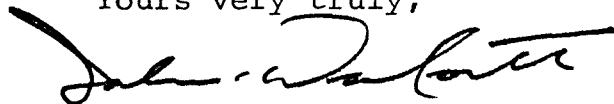
Further, Section 13, Article VI of the Missouri Constitution provides:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

We also enclose for your information our Opinion No. 13 dated February 4, 1966, to Burrell, which is self-explanatory.

It is our view that the sheriff must pay the amount received by him in excess of that which he is permitted to retain, as noted above, into the treasury of New Madrid County.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 203  
5-13-65, Fritz

Op. No. 166  
8-31-76, Nielsen

Op. No. 13  
2-4-66, Burrell



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

October 26, 1976

OPINION LETTER NO. 211

Honorable Vernon Betz  
State Representative, 3rd District  
Route 1, Box 27  
Trenton, Missouri 64683

Dear Representative Betz:

This letter is in response to your question asking as follows:

- "1. Can a county court under Section 49.265, RSMo, or any other section, set the daily hours during which the county clerk is required to keep his office open?
- "2. Does the county clerk have authority during hours when his office is closed to the general public to admit persons into his office and let them cast absentee ballots and refuse to admit the general public to his office during such hours when members of the general public wish to vote absentee ballots in his office at such time?"

We understand that you are referring to a third class county.

After a diligent review of the statutes of this state and Missouri court holdings, we find nothing that would prohibit the county clerk from opening his office at hours after the close of general business hours for the purpose of allowing voters to cast absentee ballots. In view of the importance of the right to vote, we are doubtful that a court would restrict

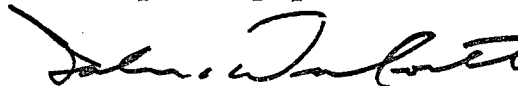
Honorable Vernon Betz

the county clerk from providing such services to the voters in the absence of a clear statutory prohibition. As we indicated, we find no such prohibition.

With respect to your second question, it is our view that if the county clerk opens his office for such purposes after the close of business hours he may not limit the services offered to certain persons or segments of the voters, but must offer the same service to such other absentee voters who present themselves at that time and also request the right to vote. Obviously, the county clerk is a public officer and he conducts a public office. It is contrary to public policy to allow such a clerk to show favoritism to certain voters to the exclusion of the other voters.

In reaching these conclusions we point out that we do not have a particular and concise set of facts before us. What we have said are general statements expressing our views on the subject.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

ELECTIONS:  
CANDIDATES:

When a candidate for associate county judge is nominated at the August primary and attempts to withdraw as a candidate less than forty-three days prior to the date of the general election such attempted withdrawal is a nullity and void and his name is to be printed on the general election ballot.

OPINION NO. 216

November 12, 1976

Mr. John Casteel  
Prosecuting Attorney  
Camden County  
Camdenton, Missouri 65020



Dear Mr. Casteel:

This is in answer to your opinion request reading as follows:

"Under Section 120.375 RSMo which candidate should the County Clerk place on the ballot for the November general election, the candidate that withdrew 42 days prior to the election or the replacement candidate chosen by the Republican Committee?"

You further state:

"Gilbert Brown was the duly nominated candidate for associate County Judge in the August Primary. On September 21, 1976, Mr. Brown tendered to the County Clerk, Leo Marler, his withdrawal from the November General Election. The Camden County Republican Committee then chose Bobbie Jones as the replacement on the ballot. On October 20, 1976, it was brought to the attention of the County Clerk that the withdrawal was filed only 42 days prior to the General Election, therefore, not meeting the 43 day requirement."

Section 120.375, RSMo Supp. 1975, provides as follows:

"1. Any person who has filed a declaration of candidacy or any person nominated in the August primary election by his party as a candidate for an elective office, who wishes

Mr. John Casteel

to withdraw as a candidate, must do so by filing a written, sworn statement of withdrawal in the office in which his original declaration of candidacy was filed not later than forty-three days prior to the day of the primary or general election, as the case may be.

"2. The name of a person who has properly filed a declaration of candidacy, or of a person nominated by his party for office, who has not given notice of withdrawal as provided in subsection 1, shall, except in case of death, be printed on the official primary or general election ballot, as the case may be. (Emphasis added)

It is our view that under the plain, clear, unequivocal provisions of Section 120.375, an attempt to withdraw by a nominee less than forty-three days preceding the general election is a nullity and that his name is required to be printed on the general election ballot. As can be seen from the provisions of such section the only instance in which a substitute nomination can be made is when a vacancy in nomination occurs by reason of death.

It has been suggested that under provisions of Section 120.550, RSMo, a candidate has a right to withdraw up to thirty days before the day of election and that the party committee has authority to fill the vacancy in nomination caused by such withdrawal. Section 120.550, provides in part as follows:

"1. The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:

(1) When a vacancy in the candidates for nomination as a party candidate for election to any office shall occur by reason of death or resignation after the last day in which a person may file as a candidate for nomination;

(2) When any person nominated as the party candidate for any office shall die or resign before election;

Mr. John Casteel

(3) When a vacancy in office which is to be filled for the unexpired term at the following general election shall occur after the last day in which a person may file as a candidate for nomination.

"2. Nominations to fill vacancies caused by death shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the person in nomination or with the election authority not later than ten days before such election. Nominations to fill vacancies caused by resignation or withdrawal of a candidate shall be filed with the secretary of state or election authority not later than thirty days before the day fixed for the election."

It is our view that Section 120.550 does not purport to state that a political committee has a right to nominate a candidate in place of a candidate who withdraws thirty days before the election and less than forty-three days before election. It is our view that the meaning of the provision, . . . "Nominations to fill vacancies caused by resignation or withdrawal of a candidate shall be filed with the secretary of state or election authority not later than thirty days before the day fixed for the election. . . ." simply sets out the last date upon which a nomination to fill a vacancy caused by withdrawal or resignation of a candidate may properly be filed by a party committee. It is our view that reading Sections 120.375 and 120.550 together demonstrate that a candidate may legally withdraw or resign his nomination at any time after the nomination has been made and up to forty-three days before the date of election and that the nomination by the party committee to fill such vacancy in nomination shall be filed with the proper election authority not later than thirty days before the date fixed for election. We believe the same reasoning to be applicable to the provisions of Section 120.560. Such section provides in part as follows:

"When any vacancy, which may be filled by a candidate nominated by a party committee pursuant to section 120.090 or section 120.550, occurs too late to permit the committee to file its nomination within the time prescribed in such sections, the chairman of the party

Mr. John Casteel

committee of the county, district or state,  
as the case may be, is hereby empowered to  
make a nomination to fill such a vacancy.  
. . ."

With reference to a vacancy caused by withdrawal, we believe the meaning of this provision to be that when the vacancy occurs more than forty-three days before an election and a political committee is unable to make a nomination to fill such vacancy within the time permitted in Section 120.550, such vacancy in nomination can be filled by the committee chairman as provided in Section 120.560.

Such section does not, in our view, purport to provide that a party committee chairman can make a nomination to fill a vacancy in nomination caused by withdrawal or resignation of a nominee within the forty-three day period before the election as provided in Section 120.375. Further, Section 120.375 was enacted after Sections 120.550 and 120.560 were enacted and if there are any provisions in Section 120.375 contrary to the provisions of Sections 120.550 and 120.560, the provisions which are contrary found in Section 120.375 must prevail because such section constitutes a later enactment by the General Assembly.

In the case of Collins v. Twellman, 126 S.W.2d 231 (Mo. 1939), the Supreme Court of Missouri said, l.c. 233:

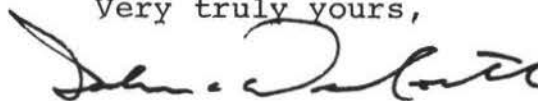
". . . Appellant concedes that when one of two conflicting statutes must prevail then all else being equal a special statute must take precedence over the general law; also that all else being equal later statutes take precedence over earlier statutes."

#### CONCLUSION

It is the opinion of this office that when a candidate for associate county judge is nominated at the August primary and attempts to withdraw as a candidate less than forty-three days prior to the date of the general election such attempted withdrawal is a nullity and void and his name is to be printed on the general election ballot.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

November 4, 1976

OPINION LETTER NO. 217

Answer by Letter - Klaffenbach

Honorable Donald L. Manford  
State Senator, 8th District  
Room 334, Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Manford:

This letter is in response to your opinion request in which you ask whether a probate ex officio magistrate judge may also serve as an appointed city judge for compensation in a city of the fourth class.

While there may be other objections to such an arrangement, it is our view that Section 24 of Article V of the Missouri Constitution is an applicable prohibition. This is because Section 24 of Article V provides that no judge or magistrate shall receive any other or additional compensation for any public service. Therefore, in direct answer to your question, it would be a violation of such section for a judge to receive additional compensation for any public service. Since service as a municipal judge constitutes a public service such an arrangement falls within the prohibition of the Constitution.

Very truly yours,

JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

November 23, 1976

OPINION LETTER NO. 221

Mr. Raymond M. Weber  
Prosecuting Attorney  
Ste. Genevieve County  
County Courthouse  
Ste. Genevieve, Missouri 63670

Dear Mr. Weber:

This letter is in response to your opinion request asking as follows:

"WITH REGARD TO HOUSE BILLS 1090 and 1209 and Section 53.135 Missouri Revised Statutes, providing for the reimbursement for actual and necessary miles traveled by an Assessor payable upon filing of a statement with the County Court, does the County Court have the authority to require that said statement include an itemized daily listing of actual and necessary miles traveled."

Amended Section 53.135, RSMo, provides as follows:

"The county assessor in counties of the third and fourth classes shall be allowed a reimbursement for actual and necessary travel expenses incurred in the performance of his official duties within the county at the rate of fifteen cents per mile, payable monthly upon the filing of a statement by the assessor with the county court showing the actual and necessary miles traveled during the month, except that the total reimbursement

Mr. Raymond M. Weber

received by any assessor in one year shall not exceed two thousand two hundred fifty dollars, to be paid out of the county treasury."

As can readily be seen the only change which was effected by this amendment was to raise the payments for mileage to fifteen cents per mile from eight cents per mile and to raise the maximum reimbursement from twelve hundred dollars to two thousand two hundred fifty dollars in one year.

In Jackson County v. Fayman, 44 S.W.2d 849, 852 (Mo. 1931), the Supreme Court of Missouri stated with respect to the powers of the county court:

"By our Constitution, county courts are created and are given jurisdiction to transact all county business. Article 6, §36. [Art. VI, §7, 1945 Mo. Const.] By statute, section 2078, R.S. 1929, [§49.270, RSMo] such courts are given power 'to audit and settle all demands against the county.' And section 12162, R.S. 1929, [§50.160, RSMo] provides that 'the county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts.' The county court, when it ascertains any sum of money to be due from the county, shall order the clerk to issue a warrant in a prescribed form. Section 12163, R.S. 1929 [§50.180, RSMo]. . . ."

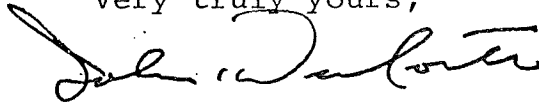
In our Opinion No. 50, dated March 5, 1964, to Henry, this office interpreted the provisions of this section and concluded that in order for the assessor to obtain payment for travel expenses he must have incurred them in the actual performance of his duties. Therefore, it is clear that not all travel expenses claimed by the assessor would be reimbursable under such section.

In answer to your question, we are of the view that the county court does have the authority to require that the assessor's travel statement include an itemized daily listing of actual and

Mr. Raymond M. Weber

necessary miles traveled and such other information as may be reasonably calculated to aid the county court in the performance of its duty to manage all county business as prescribed by law, pursuant to Section 7, Article VI of the Missouri Constitution.

Very truly yours,

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JOHN C. DANFORTH  
Attorney General

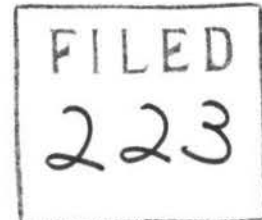
Enclosure: Op. Ltr. No. 50  
3-5-64, Henry

TAXATION: None of the commissions provided for  
COMPENSATION: collectors of third and fourth class  
COUNTY COLLECTORS: counties not having township organiza-  
tion under the provisions of the sub-  
sections of Section 52.260, RSMo Supp. 1975, apply to the collec-  
tion of current delinquent taxes and such collectors are entitled  
to only the commissions provided in Section 52.290, RSMo, for col-  
lecting such taxes.

OPINION NO. 223

December 22, 1976

Honorable George W. Lehr  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This opinion is in response to your question asking as follows:

"Please refer to Attorney General Opinion No. 165-1971, Hunter. The conclusion does not mention current delinquent taxes which we will define as those collected during the months of January and February.

"Is a third or fourth class county (other than township) collector entitled to commissions for the collection of current delinquent taxes under both Sections 52.260 and 52.290, RSMo 1969? If not, to which is he entitled?"

You ask that your question include subsections (1) through (15) of Section 52.260, RSMo Supp. 1975, for all third and fourth class counties other than township organization counties.

You have referred to our Opinion No. 165, dated April 8, 1971, to Hunter, in which this office concluded that in determining the rates of commissions of county collectors of third class counties whose offices fall within subsection 14(a) of Section 52.260, RSMo 1969, insofar as county collectors are concerned, the phrase "tax bills placed in his hands," as referred to in subsection 14(a) of Section 52.260, RSMo, does not include back taxes for prior years and that a collector

Honorable George W. Lehr

is entitled to a commission for collecting back taxes for prior years only in accordance with Section 52.290, RSMo.

Section 52.260, now found in RSMo Supp. 1975, has been amended since the issuance of Opinion No. 165, 1971, but such amendment does not affect the conclusion we reached in that opinion. Such section still excludes commissions for "back, delinquent, and ditch and levee taxes." Section 52.290, RSMo, has not been amended and still provides that in all counties collectors shall be allowed a commission for the collection of delinquent and back taxes of two percent for all sums collected to be added to the face of the tax bill and collected from the party paying the tax. It has been said in State v. Davis, 73 S.W.2d 406, 407 (Mo.Banc 1934), that ". . . before taxes become delinquent, they must have been current. . . ." And, it has been held in State ex rel. White v. Fendorf, 296 S.W. 787, 789 (Mo. 1927), that:

". . . 'back tax' means the same as 'delinquent tax,' and . . . both terms apply to taxes remaining unpaid on January 1st of the year after which the assessment was made, and at any time thereafter. . . ."

There does appear to be some distinction between real estate back taxes and delinquent taxes in that such back taxes are delinquent taxes which have been placed in the back tax book.

We are of the view that current delinquent taxes are necessarily "delinquent" taxes within the meaning of Sections 52.260 and 52.290.

Therefore, under the reasoning of Opinion No. 165, 1971, in which we distinguished the holding of the court in State ex rel. Shannon County v. Hawkins, 70 S.W. 119 (Mo. 1902), and cases which relied upon Hawkins, we conclude that the collector of such a third or fourth class county is entitled to commissions for collecting "current delinquent taxes" only in accordance with Section 52.290, RSMo 1969.

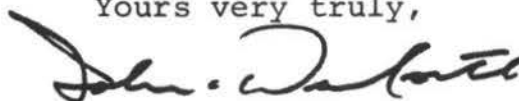
#### CONCLUSION

It is the opinion of this office that none of the commissions provided for collectors of third and fourth class counties not having township organization under the provisions of the subsections of Section 52.260, RSMo Supp. 1975, apply to the collection of current delinquent taxes and that such collectors are entitled to only the commissions provided in Section 52.290, RSMo, for collecting such taxes.

Honorable George W. Lehr

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

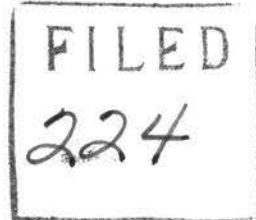
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JOHN C. DANFORTH  
Attorney General

December 21, 1976

OPINION LETTER NO. 224  
Answer by letter-House

Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in response to your request for an opinion concerning the relationship between Section 350.015, RSMo Supp. 1975, and Chapter 351, RSMo 1969. Your request is as follows:

"Section 350.015 RSMo 1969, as amended provides in pertinent part: 'Corporations not to engage in farming, exceptions - after September 28, 1975, no corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to agricultural land in this state, provided, however that the restrictions set forth in this section shall not apply to the following . . .'. The statute lists ten exceptions.

"Does this section prohibit the forming of farm corporations subsequent to September 28, 1975, under the provisions of Chapter 351, RSMo?"

Section 350.015 provides as follows:

"After September 28, 1975, no corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest, whether legal, beneficial

Honorable James C. Kirkpatrick

or otherwise, in any title to agricultural land in this state, provided, however, that the restrictions set forth in this section shall not apply to the following:

(1) A bona fide encumbrance taken for purposes of security;

(2) A family farm corporation or an authorized farm corporation as defined in section 350.010;

(3) Agricultural land and land capable of being used for farming owned by a corporation as of September 28, 1975 including the normal expansion of such ownership at a rate not to exceed twenty percent, measured in acres, in any five-year period, or agricultural land and land capable of being used for farming which is leased by a corporation in an amount, measured in acres, not to exceed the acreage under lease to such corporation as of September 28, 1975 and the additional acreage for normal expansion at a rate not to exceed twenty percent in any five-year period, and the additional acreage reasonably necessary whether to be owned or leased by a corporation to meet the requirements of pollution control regulations.

(4) A farm operated wholly for research or experimental purposes, including seed research and experimentation and seed stock production for genetic improvements, provided that any commercial sales from such farm shall be incidental to the research or experimental objectives of the corporation;

(5) Agricultural land operated by a corporation for the purposes of growing nursery plants, vegetables, grain or fruit used exclusively for brewing or winemaking or distilling purposes and not for resale, for forest cropland or for the production of poultry, poultry products, fish or mushroom farming, production of registered breeding stock for sale to farmers to improve their breeding herds, for the



Honorable James C. Kirkpatrick

production of raw materials for pharmaceutical manufacture, chemical processing, food additives and related products, and not for resale.

(6) Agricultural land operated by a corporation for the purposes of alfalfa dehydration exclusively and only as to said lands lying within fifteen miles of a dehydrating plant and provided further said crops raised thereon shall be used only for further processing and not for resale in its original form.

(7) Any interest, when acquired by an educational, religious, or charitable not for profit or pro forma corporation or association;

(8) Agricultural land or any interest therein acquired by a corporation other than a family farm corporation or authorized farm corporation, as defined in section 350.010, for immediate or potential use in nonfarming purposes. A corporation may hold such agricultural land in such acreage as may be necessary to its nonfarm business operation; provided, however, that pending the development of agricultural land for nonfarm purposes, such land may not be used for farming except under lease to a family farm unit, a family farm corporation or an authorized farm corporation, or except when controlled through ownership, options, leaseholds, or other agreements by a corporation which has entered into an agreement with the United States of America pursuant to the New Community Act of 1968 (Title IV of the Housing and Urban Development Act of 1968, 42 U.S.C. 3901-3914) as amended, or a subsidiary or assign of such a corporation; or

(9) Agricultural lands acquired by a corporation by process of law or voluntary conveyance in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise;

Honorable James C. Kirkpatrick

provided, that any corporation may hold for ten years real estate acquired in payment of a debt, by foreclosure or otherwise, and for such longer period as may be provided by law.

(10) The provisions of sections 350.010 to 350.030 shall not apply to the raising of hybrid hogs in connection with operations designed to improve the quality, characteristics, profit ability, or market ability of hybrid hogs through selective breeding and genetic improvement where the primary purpose of such livestock raising is to produce hybrid hogs to be used by farmers and livestock raisers for the improvement of the quality of their herds."

You ask whether Section 350.015 prohibits the forming of farm corporations subsequent to September 28, 1975, under the provisions of Chapter 351. Chapter 350 does not deal with the forming of corporations. That chapter does not set out any standards or methods of incorporation. However, Section 351.020 states that:

"Corporations for profit, except those which are required to be organized, exclusively under other provisions of law, may be organized under this chapter for any lawful purposes." (Emphasis added)

Moreover, it has been established that:

"Subject to the restrictions of constitutional provisions, the Legislature of this state has plenary power to create corporations and prescribe the business in which they may engage. . . ." Sylvester Watts Smyth Realty Co. v. American Surety Co. of New York, 238 S.W. 494, 497 (Mo. 1921)

The law clearly permits incorporation only for "lawful" purposes. Chapter 350 outlines allowable purposes for corporate farming. Since Section 351.020 allows corporations to be formed only for lawful purposes, any entity which seeks incorporation for any purpose prohibited in Chapter 350 should be denied incorporation. As a result, Section 350.015 prohibits the incorporation of any entity to engage in farming unless that entity meets the exceptions outlined in Section 350.015. Consequently, entities which

Honorable James C. Kirkpatrick

can come within the exceptions of Section 350.015 should be allowed to incorporate.

We do point out that corporations may be incorporated for any purpose authorized by Section 350.015 and that such corporations are not limited to "family farm corporation" or "authorized farm corporation" as defined by Section 350.010.

Yours very truly,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

November 23, 1976

OPINION LETTER NO. 226

Arthur L. Mallory, Commissioner  
Department of Elementary and Secondary Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Commissioner Mallory:

We have reviewed the Missouri State Board of Education's "State Plan for Vocational Rehabilitation Services Under Section 101 of the Rehabilitation Act of 1973), as amended (by the Rehabilitation Act Amendments of 1974)." Our review has taken into consideration the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 701, et seq., and the regulations implementing the Rehabilitation Act of 1973, as amended, 45 C.F.R. Section 1361 (40 Fed.Reg. 54699 et seq., effective November 25, 1975). In addition, we have taken into consideration Article III, Section 38(a), Missouri Constitution, Chapter 161, RSMo 1969, and Section 178.610, RSMo 1969.

Based on the foregoing, we hereby certify that the Missouri State Board of Education is the state agency administering or supervising the administration of education and vocational education in the State of Missouri, and is, therefore, qualified to be "the sole State agency to administer the State plan, or to supervise its administration in a political subdivision of the State by a sole local agency . . . ." in accordance with 45 C.F.R. Section 1361.6.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written over a horizontal line.

JOHN C. DANFORTH  
Attorney General